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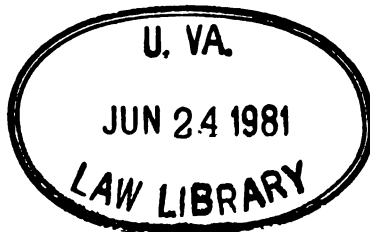
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A SELECTION OF LEADING CASES
ON
MERCANTILE AND MARITIME LAW.

A
SELECTION OF LEADING CASES
ON
MERCANTILE AND MARITIME
LAW.

With Notes.

BY OWEN DAVIES TUDOR,
OF THE MIDDLE TEMPLE, ESQ., BARRISTER AT-LAW.
AUTHOR OF 'A SELECTION OF LEADING CASES IN EQUITY,' ETC.



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P R E F A C E.

THE plan of this selection of Leading Cases is like that adopted in similar collections. Cases frequently cited in our Courts, or in which some important principle was first enunciated in clear and decisive terms, are first chosen, and to these are appended Notes, in which an attempt is made to develop the principles laid down in the cases, great care being at the same time taken to notice the recent authorities.

The Cases in this work may be divided into two important divisions; the first, relating to ordinary mercantile law in time of peace; the second, relating to the effect of war, and especially of maritime war, upon the property and contracts of merchants.

In the first class of Cases will be found principally the judgments of Lord Hardwicke, C., Lord Mansfield, C. J., Eyre, C. J., Lawrence, J., Lord Eldon, C., Sir Wm. Grant, M. R., Lord Redesdale, C., Lord Ellenborough, C. J., Lord Tenterden, C. J., Lord Brougham, C., Lord Abinger, C. B., and Parke, B. (now Lord Wensleydale),—judges than whom the authority of none can be higher in all questions relating to mercantile law.

The second class of Cases consists principally, as might be expected, of the decisions of Sir William Scott (better known now perhaps as Lord Stowell) whose judgments have, with no undue strain of compliment, been termed models of judicial eloquence.

The subjects illustrated by the decisions selected as "Leading Cases," and the annotations thereon, will be found in the annexed List of Cases reported.

16, *Old Square, Lincoln's Inn,*
March, 1860.

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CORRIGENDA.

- Page 151, col. 1, line 2 from top, for "exist" read "existed."
- " 152, col. 2, line 17 from bottom, for "such" read "each."
- " 192, col. 2, line 1, after "partial" insert "proceeds."
- " 195, col. 2, line 7 from bottom, after "policies" read "the sum fixed."
- " 265, col. 1, line 14 from bottom, for "Waterbottom" read "Winterbottom."
- " 312, col. 1, line 1, for "Winter" read "Wintle."
- " 314, col. 1, line 16 from bottom, for "Hawker" read "Hawken."
- " 314, col. 2, line 2 from top, after "not liable" read "to third parties."
- " 326, col. 1, line 17 from bottom, for "when" substitute "at what times."
- " 340, col. 2, line 19 from top, for "house" read "lease."
- " 345, col. 2, line 13 from bottom, after "both the" read "the estates of."
- " 373, col. 2, line 18 from top, for "Mac. Arth." read "M'Arth."
- " 376, col. 2, line 19 from bottom, for "which" read "what."
- " 379, col. 2, line 14 from top, for "e." read "and."
- " 410, col. 2, line 13 from top, for "4 David" read "2 David."
- " 410, col. 2, line 8 from bottom, for "4 David" read "2 David."
- " 463, col. 2, line 10 from bottom, for "c. 67" read "c. 106."
- " 471, col. 1, line 13 from top, for "78" read "68."
- " 517, col. 2, line 10 from top, for "if" read "though."
- " 529, col. 1, line 7 from top, for "vendee" read "vendor."
- " 586, col. 2, line 15 from top, after "due" insert "for."
- " 601, col. 2, line 19 from top, after "lost by a" insert "wrongful."
- " 603, col. 1, line 10 from bottom, for "Spettiyue" read "Spettigue."
- " 611, col. 2, line 8 from top, for "has purchased" read "took."

LEADING CASES
ON
MERCANTILE AND MARITIME LAW.

DEVAYNES *v.* NOBLE.

CLAYTON'S CASE.

July 23rd, 24th, 26th, 1816.

[REPORTED 1 MER. 585.]

APPROPRIATION OF PAYMENTS.]—*On the death of D., a partner in a banking firm, there was a balance of £1713 in favour of C., who had a running account with the firm. After the death of D. his late partners became bankrupt, but before their bankruptcy C. had drawn out sums more in amount than £1713, and had paid in sums still more considerable :—Held, that the sums drawn out by C. after the death of D. must be appropriated to the payment of the balance of £1713 then due, and that consequently the estate of D. was discharged from the debt due from the firm at his death, the sums subsequently paid in by C. constituting a new debt, for which the surviving members of the firm were alone liable.*

It appeared in this case that William Devaynes, John Dawes, William Noble, R. H. Croft, and Richard Barwick carried on the business of bankers in partnership together. William Devaynes died on the 29th of November, 1809. The surviving partners carried on the business on their own proper account, the representatives of William Devaynes having no continuing share or interest

*

B

in the business or the profits thereof. On the 30th July, 1810, the surviving partners became bankrupt.

At the death of Devaynes, Clayton's cash balance in the hands of the partnership amounted to £1713 and a fraction.

After the death of Devaynes, and before Clayton paid in any further sums to his account with the bankers, he drew out of the house sums to the amount of £1260, thereby reducing his cash balance to £453 and a fraction.

From this time to the bankruptcy, Clayton both paid in and drew out considerable sums; but his payments were so much larger than his receipts that, at the time of the bankruptcy, his cash balance, in the hands of the surviving partners, exceeded £1713, the amount of the cash balance at Devaynes's death.

It appeared from the Master's Report, that a notice was given by the executors of Devaynes that they were not connected with the house, and that it had been drawn up by a firm of solicitors of which Clayton was a member, though it appeared that he knew nothing of such notice until after the bankruptcy.

It also appeared that Clayton kept his accounts with the partnership, according to the custom of bankers with their country customers. On the 30th of March, 1810, his account was made up and balanced by the surviving partners, and transmitted to him, and the balance carried forward, and the account continued to the time of the bankruptcy.

By the amount of the dividends received since the bankruptcy, (those dividends being apportioned to the whole debt proved under the Commission,) the balance of £1713 would be reduced to £1171 and a fraction; and it was this last sum which Clayton claimed against Devaynes's estate, and as to which the Master had reported that Clayton had, by his subsequent dealings with the surviving partners, released the said estate.

But now, upon the argument of the exception to the report, and in consequence of the decision in *Miss Sleech's* case (1 Mer. 539), that claim was abandoned to the whole extent of the cash balance at Devaynes's death above £453, the sum to which it had been reduced by drafts upon the house previous to any fresh payments made to it; and that which was now claimed is the last-mentioned sum of £453, minus its proportion of the dividends.

Bell and Palmer, Fonblanque and Clayton, in support of the exception.

This is a case, the decision of which will be of the greater importance, as it has lately been one of frequent occurrence, and has never been decided, either at law or in equity. Suppose that in this case, Devaynes, instead of dying, had merely quitted the partnership; and that public notice had been given of that event tantamount to the notice afforded by the advertisement of his death in the newspapers; and that the same transactions had taken place with the continuing partners which have now taken place with the surviving partners. In such case, the question would have been a mere legal question; and what we submit is, that in such a case the retiring partner would clearly be liable to the extent of the £453; and, if so, then that, in the present case, the rule of equity is strictly analogous to the rule of law.

If this view be correct, then all that remains to be considered is, whether there are here any special circumstances which would, in the case we are supposing, have discharged the legal liability.

The legal principle is that which is laid down in *Bois v. Cranfield*, Styles 239; Vin. Ab. tit. Payment, M. pl. 1; and appears to be this, viz.: that if a man owes another two debts, upon two distinct causes, and pays him a sum of money, he (the payor) has a right to say to which account the money so paid is to be appropriated.

Then follows *Heyward v. Lomax*, 1 Vern. 24, deciding that if a man, owing another money on a security carrying interest, and also on simple contract, pays money generally, without specifying on what specific account, it shall be taken to the advantage of the payor, in discharge of the debt carrying interest. This however has been overruled by subsequent cases.

The next is *Perris v. Roberts*, 1 Vern. 34, where there being a mortgage debt, and also a debt by simple contract, and both being cast into one stated account, and a bill of sale being made for securing the balance, which proved deficient, the payment was decreed to be apportioned. In this case there were strong circumstances to have exonerated the debtor altogether.

In *Manning v. Westerne*, 2 Vern. 606, however, the rule is strictly brought back within its former limits. There a man indebted both by specialty and by simple contract, having made payments and entered them in his book as made on account of what was due by specialty, this was held not a sufficient appropriation; and the Lord Chancellor (Lord Cowper) said, that the rule of law "quicquid solvitur solvitur secundum modum solventis" is to be understood only when at the time of payment the payor declares

the purpose. If he does not, the payee may direct how it shall be applied. See, to the same purpose, *Anon.*, 2 Mod. 236, and *Bowes v. Lucas*, Andrews, 55.

Meggott v. Mills, Lord Raym. 287, must also be mentioned, because that is a case on which some stress will probably be laid. Lord C. J. *Holt* there expressed it to be his opinion that, where two sums were due, one of which might make the debtor a bankrupt, and the other (being a debt incurred after he ceased to trade) could not produce that consequence, the payment should be taken without more, as meant to be applied to the former debt. But this opinion of Lord *Holt's* has since been called in question.

Goddard v. Cox, 2 Stra. 1194, is next in order of time, and has been considered as a ruling case ever since its decision. There a widow, being indebted as executrix to her deceased husband, became also indebted on her own account, and afterwards married again, and her second husband became also indebted on his own account, and made payments without declaring the purpose. It was agreed that he had the first right to appropriate his payments ; but having neglected it, that it devolved on the payee, who might apply them as he pleased, either to the debt incurred by the wife *dum sola*, for which the husband was answerable, or to the husband's own debt, but not to the debt of the wife as executrix. And a case of *Bloss v. Cutting* was there cited to the same effect as *Manning v. Western*, and the rest.

The next case is *Hammersly v. Knowlly*, 2 Esp. 665, which would have been against us if we had contended for the whole amount of Clayton's claim ; but, taking it at the lesser sum only, is in our favour. In that case, Lord *Kenyon* held that the note of A. being deposited by B. at his bankers', as a security for money, the bankers knowing that it was an accommodation note, and B. afterwards paying money to his bankers without any specific appropriation, the money must be placed, as far as it would go, in discharge of the then existing debt ; and the banker could not make the maker of the note responsible for more than the balance remaining due at the time of such payment, although he afterwards trusted his debtor with a further sum of money.

Then comes *Dave v. Holdsworth*, Peake, N. P. 64, which was an action of trover. The defence was bankruptcy ; and the question arose, as it did in the case of Lord *Raymond*, whether the petitioning creditor's debt could be established by reason of the bankruptcy. To establish the bankruptcy, the defendant proved that

Pittard was a trader, and so continued till 1785, when he became indebted to one creditor in £200, upon whose petition the commission issued. This debt was originally a simple contract debt, but a bond was given after he had ceased to be a trader; and Lord *Kenyon* held that the question was, not when the bond was given, but when the debt was contracted. There had been dealings between the bankrupt and the petitioning creditor since he ceased to be a trader; and it proved that, though at the time of the commission issued, there was a larger balance than £200 due to the creditor, yet more than £200 had also been paid on account between the time when the trading ceased and the issuing of the commission. Lord *Kenyon* further held that, as no particular directions had been given for the application of the money paid on account, it must be placed to pay off the old debt first. Consequently, no part of the debt contracted while Pittard was a trader remained due when the commission issued; and the commission itself was therefore unsupported.

Now, *prima facie*, this seems to be an authority unfavourable to us. But in *Peters v. Anderson*, 5 Taunt. 596, after all the cases on the subject had been fully gone through, it was laid down that, although the payor may apply his payment to which of two or more accounts he pleases, and although his election may be either expressed or inferred from the circumstances of the transaction, yet, if not paid specifically, the receiver might afterwards appropriate the payment to the discharge of either account as he pleases. And Lord C. J. *Gibbs*, referring to the cases of *Meggott v. Mills* and *Dawe v. Holdsworth*, observes that, in both, the debts arose on the same account, and it was totally immaterial to which end of the account the payment should be applied; but that Lord C. J. *Holt*, and after him Lord *Kenyon*, went upon this ground, that it would be too hard if a man having made a payment sufficient to exempt him from the operation of the bankrupt laws, should not have the benefit of paying off that part of his debt which subjected him to their operation. "It is an exception," he said, "and founded on the circumstance of bankruptcy."

There is one more case, of *Newmarch v. Clay*, 14 East, 239, where Lord *Ellenborough* said, there might be a special application of a payment made, arising out of the nature of the transaction, though not expressed at the time in terms by the party making it. And he said, the payment in that case was evidenced by the conduct of the parties to have been made for the purpose of taking up the

bills which had been antecedently dishonoured ; for that, upon receiving that payment, the dishonoured bills were delivered up. And upon that ground, the Court of King's Bench were of opinion there ought to be a new trial ; the present Lord Chief Baron (Richards, C. B.) having previously decided it upon the general principle that, where there is no express appropriation, the payee has a right to apply the payment at his own option ; which general principle is also admitted by the very ground on which the Court of King's Bench granted the new trial. Upon this, therefore, the doctrine of courts of common law rests at the present day.

Now, to apply this doctrine to the circumstances of the present case. In none of those cited does it appear that the payee had actually appropriated the payments made until the matter came into question ; and the last case, of *Newmarch v. Clay* (as well as the principle of *Goddard v. Cox*) shows that the doctrine applies equally in the case of a partnership. Then it is shown that the Court may, from circumstances, infer the intention to apply a payment in discharge of the old debt ;—but what were the circumstances from which that inference was drawn in the case referred to ? They were of such a nature that no doubt could arise respecting their tendency. Accordingly, the counsel acquiesced immediately, and did not even urge an inquiry. The case of *Dawe v. Holdsworth* proves, what we do not mean to dispute, that, when the old debt is completely discharged, the payments subsequently made must be applied in discharge of the new debt. This is the only case in which we hear of applying the payments to a first debt in priority to a subsequent debt ; and this is the case which Lord C. J. *Gibbs* afterwards says was rightly decided, upon the principle that one debt would have exposed the party to a commission of bankruptcy, stating that “it is an exception founded on the circumstance of bankruptcy.”

Now, still considering the present case as involving the legal question, let us suppose that Devaynes retired from the partnership in November, 1809 ; from that time till the commission issued in July, 1810, Mr. Clayton continued to deal with the house, both by paying in and drawing out ; and in making his payments, he had a right to apply them to whatever demand he thought proper. But it is said there are special circumstances. What are they ? First, that Mr. Clayton's partner gave notice to the house that Devaynes would have nothing more to do with the house. What would be the effect at law of such a notice ? Does it discharge the debt ? A release

cannot be by parol. How then could the debt be discharged? Not by subsequent payments; for, those payments being made generally, the payee had a right to attribute them to whatever account he pleased. In fact, there was no payment made to the account of the old debt, except as it was actually reduced on the entire balance. Then, was it in any manner altered in consequence of Clayton's accepting the new house as his debtors? He never did accept them as his debtors, any otherwise than as they were and continued to be his debtors in law. But he never, by any acts of his, specifically accepted them as such. This might have been more strongly urged in *Newmarch v. Clay*. Devaynes's executors could not, by giving notice, withdraw themselves from their responsibility. Then what does the notice amount to? Besides, notice to a partner does not bind, except in the case of a co-partnership transaction; and, therefore, even if this notice could operate as a discharge, (but which it cannot,) if both had been privy to it, it could not at all events have any effect whatever on Mr. Clayton.

Then there is the circumstance of the account delivered in March, 1814. What conclusion can be drawn from that circumstance? Clayton had continued to deal with the house; so had the parties in *Newmarch v. Clay*; so they had in *Meggott v. Mills*, and in *Peters v. Anderson*. There can be no distinction between a banking co-partnership and any other co-partnership. The question is, was the sending this account any admission by Clayton that, so far as his debt had not been paid, he considered this account as a payment? The proper way to try this would be by supposing that the account consisted only of sums drawn out. And this, as your Honour has already decided in Miss *Sleech's* case, would not have operated in discharge. Does the circumstance of the creditor having paid in, as well as drawn out, make any distinction? It proves that he credited the house for the sums so paid in, not that he credited it for an already existing debt of Devaynes: that remains just as it did before; upon that security he rested, and had a right to rest.

So it would be at law, if Devaynes had only retired from the partnership. What then discharges his estate in equity? We have already your Honour's opinion that, although in this case it is a mere equitable demand, yet it is an equity founded upon the principles of law; and, if so, it is impossible to conceive of any defence in equity that would not have been an available defence at law, supposing the circumstances of the case were such as to constitute it a legal demand instead of an equitable.

The following cases were also cited in support of this exception : *Wilkinson v. Sterne*, 9 Mod. 427 ; *Hall v. Wood*, 14 East, 243 n. ; *Kirby v. Duke of Marlborough*, 2 Mau. and Selw. 18.

Hart, Wetherell and Sidebottom, and *Hazlewood*, for different parties against the exception.

The four surviving partners, having possessed themselves of all the funds of the five, were bound first to discharge the obligations of the five ; and, in taking the accounts between the parties, the Court must consider every subsequent payment as to be carried to the account of that debt which, in a fair and equitable understanding between the parties, was first to be discharged, in exoneration of Devaynes's estate.

The rule of law to which it has been attempted to adapt this case, stands on a principle quite foreign to that with which the Court has now to deal. It is that where there are debtor and creditor, and the debtor owes more than one debt, and pays a sum of money, he has a right to direct to which of the debts that payment shall be applied ; and, if he omits to do so, then the law implies that it is immaterial to him to which the payment is applied, and, by his omission, he has left the application to the option of the creditor ; and again, that if the creditor neglects to exercise that option, still the application may be regulated by circumstances.

But how is it in the absence of all circumstances except that of the order of time ? Suppose A. owes B. a debt of £100 contracted five years ago, and another debt of £100 contracted half a year ago, and pays money equal to the discharge of either of the two debts, without directing to which it is to be applied, and without the creditor's doing any act to appropriate it to either. What then ? shall it not, in common sense, be taken as applied to the payment of that debt for which there has been the longest forbearance, and against which, if remaining unsatisfied, the Statute of Limitations will soonest operate ? (*Wentworth v. Manning*, 2 Eq. Ca. Ab. 261.)

This, however, is not a case between the same debtor and creditor. The relations of the parties are altered. What are the terms to be implied in the very first draft drawn by Clayton after Devaynes's death ? He must be considered as saying to the surviving partners, " You are my debtors in respect of a debt contracted by you and your deceased partner ; and I now call upon you to pay me a certain sum in discharge of *that debt*." He draws a second and a third draft on the same terms. He then pays in an additional sum, not expressing that he pays it to any new account, and afterwards draws a fourth

draft. What is there to show that this fourth draft was drawn upon any other terms than the three preceding? He knows that it is the duty of the four to pay the debts due from the five. He knows equally well that it is not competent to him, by giving credit to the four, to charge the estate of the deceased partner with any sums to which it was not previously liable.

If Mr. Clayton had been asked, when he began to draw upon and pay money to the surviving partners, knowing that Devaynes's representatives had nothing to do with the firm, whether he did so considering Devaynes's estate as responsible to him, or whether he did not deal upon the sole responsibility of the surviving partners, would he not, as a man of honour and integrity, have answered, "Certainly, I never had any conception that any other but the surviving partners were responsible"? If he had been asked whether he did not consider that as the ordinary course of his former dealings with the partnership, the first draft he drew on the new partnership was in like manner applicable to the old balance, would he have hesitated for a moment to say, "I drew this draft considering that, whenever there is an item on one side of an account, it is supposed to be in satisfaction of the old standing items on the other side, and that, whenever a balance is struck, there is an extinction *pro tanto* of the existing debt"? If, on the other hand, Mr. Clayton had done these acts in contemplation of reserving to himself the double responsibility of the surviving partners, and of the estate of the deceased partner, would not a court of equity have said, this is a fraud in him, to endeavour so to deal with the surviving partners as to be guaranteed by the estate of the deceased partner, without communicating to the representatives of the deceased partner that he is dealing with that intention?

When Lord *Eldon* said, in *Ex parte Kendall*, 17 Ves. 514, that there may be dealings between the surviving partners and the creditors of the old partnership which would discharge the estate of the deceased partner, could he by possibility have contemplated a stronger case in respect of such dealings than the present? If it were competent to the creditor thus to deal with the surviving partners, keeping to himself in reserve the responsibility of the deceased partner's estate for nine months after his death, why not for nine years? Why not for thirty years, during which he might have paid in hundreds of thousands; and if at the end of thirty years, one of the survivors were to become insolvent, he might even then, upon this principle, resort to the account *ab initio*, and

fixing upon the sum to which the balance was at one time reduced, call upon the Court to give him out of the estate of the deceased partner the amount of that balance?

Now, if Mr. Clayton could show, at any period, he attributed his payments into the banking-house to any particular account, and that he attributed his drafts accordingly to those payments, that might have considerable weight; for he might say, having no doubt his old balance would ultimately be paid, but doubting whether the new house would be able to pay back the sums he paid in, he had taken care to draw upon the recent payments, reserving to himself the liability of Devaynes's estate. Even then, it would be said, "Whatever was your intention, it was one upon which if you acted, you were bound to disclose it to Devaynes's representatives. Otherwise you have acted fraudulently towards them, and a court of equity will give you no assistance." But that is not the present case. There was no such intention on the part of Mr. Clayton; and it comes simply to this, whether his dealings with the surviving partners are not such as come within the meaning of Lord *Eldon* when he says, there may be dealings which would discharge the estate.

In addition to the cases already cited, the following were mentioned:—*Simpson v. Vaughan*, 2 Atk. 31; *Strange v. Lee*, 3 East, 484.

Bell, in reply.

If a man is bound in any one bond jointly with another, as principal and surety, and in another bond by himself alone, and pays money on account, nobody can doubt he means to pay off the bond in which he is solely bound, in preference to that in which another is bound with him. If it is asked on one side, how did Mr. Clayton mean to apply this payment? I would ask on the other, how did Mr. Devaynes's partners mean that it should be applied? Certainly in payment of their own debts, not of the debts of the five.

Where is the authority for the alleged rule as to the priority of the debts? In *Newmarch v. Clay*, the Lord Chief Baron was of opinion the payment was not applicable to the first debt, notwithstanding there was a partner concerned in the first who was not concerned in the second; and the Court of King's Bench afterwards varied the decision, not on that ground, but on a ground which was perfectly distinct. If that ground existed, why did Lord C. J. *Gibbs* say, that *Dawe v. Holdsworth* was distinguishable on account of its being a case of bankruptcy? Every argument applicable to this case might have been applied to *Kirby v. Duke of*

Marlborough, for Devaynes's estate cannot be placed in a higher degree of responsibility than that of a surety.

In *Ex parte Kendall*, Lord *Eldon* expressly declared he would not decide the question. Then why refer to that case as containing his Lordship's decision of this?

Whether the continuation of payments and receipts alone amounts to a discharge is a mere legal question in the case of a withdrawing partner, and must be decided on the same principles in the case of a partner who dies. Does a single payment or a single receipt alter the case? They say, Yes. But where is the authority? *Newmarch v. Clay* is an authority against them. So are all the cases. They are all cases which decide that it may be inferred from circumstances. But the question remains, what is a sufficient foundation for the inference? The continuance of the transactions, it has been held over and over again, is not enough. It must be a continuance attended with other circumstances.

Then they say, the new firm ought first to pay off the old debts. That depends upon whether they have assets of Devaynes's in their hands. If he was a debtor to them, where was the obligation between them? The obligation, if there was any, must depend on their having assets of his in their hands. But if there had been such an obligation, how would that affect Mr. Clayton as a creditor? *Crawshaw v. Collins*, 15 Ves. 218; *Featherstonhaugh v. Fenwick*, 17 Ves. 298.

The house was not trading on Devaynes's assets. In fact, the assets of the house, at the period when Mr. Devaynes quitted it, were not got in; and that creates the insolvency of the house. The house had been paying off the debts contracted in Devaynes's lifetime by their new credit; and in this very case of Mr. Clayton's where we claim only £453, the difference between that sum and the £1171 has been paid by money lodged with these gentlemen, and obtained on their own credit; for the assets of the house are still outstanding.

Then what is the equity of this case? What circumstances are there which apply to the case of a dying partner, and do not apply to the case of a retiring partner? It is said, the debt is extinguished at law; and that equity will not revive it, where there is a superior equity. But this is a fallacy. The debt was not extinguished: for though the remedy was gone at law, it continued in equity; as in *Lane v. Williams*, 2 Vern. 277, 292; *Bishop v. Church*, 3 Atk. 691, etc., as soon as the securities were found to

be given for a partnership debt, they were considered as joint and several. The simple questions therefore are, whether the continuing to deal, by drawing out and paying in, has operated to extinguish the debt, or whether it has been so extinguished by the circumstance of the account delivered. And these questions must be taken as the facts stand upon the report; that is, without any inquiry how the affairs of the house stood as between Devaynes and his partners.

The case of *Wentworth v. Manning* was one of a specific payment, and therefore does not apply. But if it were applicable, it would be contradictory to the case of *Goddard v. Cox*, and the others which have been cited, and therefore of no authority, considering the book in which it is printed (2 Eq. Ca. Ab. 261).

SIR WILLIAM GRANT, M.R.—Though the report, following (I presume) the words of the inquiry directed by the Decree, states the Master's opinion to be that Mr. Clayton has, by his dealings and transactions with the surviving partners, subsequent to the death of Mr. Devaynes, released his estate from the payment of the cash balance of £1713, yet the ground of that opinion is, not that the acts done amount constructively to an exoneration of Mr. Devaynes's estate, but that the balance due at his death has been actually paid off,—and, consequently, that the claim now made is an attempt to revive a debt that has once been completely extinguished.

To a certain extent, it has been admitted at the bar, that such would be the effect of the claim made before the Master, and insisted upon by the exception. To that extent it is therefore very properly abandoned; and all that is claimed is the sum to which the debt had at one time been reduced.

It would indeed be impossible to contend that after the balance, for which alone Mr. Devaynes's was liable, had once been diminished to any given amount, it could, as against his estate, be again augmented, by subsequent payments made, or subsequent credit given, to the surviving partners. On the part of Mr. Devaynes's representatives however it is denied that any portion of the debt due at his death now remains unsatisfied. That depends on the manner in which the payments made by the house are to be considered as having been applied. In all, they have paid much more than would be sufficient to discharge the balance due at Devaynes's death;—and it is only by applying the payments to subsequent debts that any part of that balance will remain unpaid.

This state of the case has given rise to much discussion as to the rules by which the application of indefinite payments is to be governed. Those rules we probably borrowed in the first instance from the civil law. The leading rule, with regard to the option given, *in the first place to the debtor, and to the creditor in the second*, we have taken literally from thence. But, according to that law, the election was to be made at the time of payment, as well in the case of the creditor, as in that of the debtor, "*in re præsentī, hoc est statim, atque solutum est, cæterum postea non permittitur*" (Dig. lib. 46, tit. 3, § 1). If neither applied the payment, the law made the appropriation according to certain rules of presumption, depending on the nature of the debts, or the priority in which they were incurred. And, as it was the actual intention of the debtor that would in the first instance have governed; so it was his presumable intention that was first resorted to as the rule by which the application was to be determined. In the absence therefore of any express declaration by either, the inquiry was, what application would be most beneficial to the debtor. The payment was consequently applied to the most burdensome debt; to one that carried interest, rather than to that which carried none; to one secured by a penalty rather than to that which rested on a simple stipulation; and, if the debts were equal, then to that which had been first contracted. "*In his, quæ præsentī die debentur, constat, quotiens indistinctè quid solvitur, in graviores causam videri solutum. Si autem nulla prægravet (id est, si omnia nomina similia fuerint), in antiquiores.*" (Dig. lib. 46, tit. 3, § 5.)

But it has been contended that, in this respect, our Courts have entirely reversed the principle of decision, and that in the absence of express appropriation by either party, it is the presumed intention of the creditor that is to govern; or at least that the creditor may at any time elect how the payments made to him shall retrospectively receive their application. There is certainly a great deal of authority for this doctrine. With some shades of distinction, it is sanctioned by the case of *Goddard v. Cox*, 2 Stra. 1194; by *Wilkinson v. Sterne*, 9 Mod. 427; by the ruling of the Lord Chief Baron in *Newmarch v. Clay*, 14 East, 239; and by *Peters v. Anderson*, 5 Taunt. 596, in the Common Pleas. From these cases I should collect, that a proposition which, in one sense of it, is indisputably true, namely, that *if the debtor does not apply the payment, the creditor may make the application to what debt he pleases*, has been extended much beyond its original meaning, so as, in general, to authorize *the creditor to make his election when he thinks*

fit, instead of confining it to the period of payment, and allowing the rules of Law to operate where no express declaration is then made.

There are, however, other cases which are irreconcilable with this indefinite right of election in the creditor, and which seem, on the contrary, to imply a recognition of the civil law principle of decision. Such are, in particular, the cases of *Meggott v. Mills*, Lord Raymond, 287; and *Dawe v. Holdsworth*, Peake, N. P. 64. The creditor, in each of these cases, elected *ex post facto* to apply the payment to the last debt. It was, in each case, held incompetent for him so to do. There are but two grounds on which these decisions could proceed;—either that the application was to be made to the oldest debt, or that it was to be made to the debt which it was most for the interest of the debtor to discharge. Either way, the decision would agree with the rule of the civil law, which is, that if the debts are equal, the payment is to be applied to the first in point of time; if one be more burdensome, or more penal than another, it is to that the payment shall be first imputed. A debt on which a man could be made a bankrupt, would undoubtedly fall within this rule.

The Lord Chief Justice of the Common Pleas explains the ground and reason of the case of *Dawe v. Holdsworth* in precise conformity to the principle of the civil law.

The cases then set up two conflicting rules;—the presumed intention of the debtor, which, in some instances at least, is to govern; and the *ex post facto* election of the creditor, which in other instances is to prevail. I should therefore feel myself a good deal embarrassed if the general question of the creditor's right to make the application of indefinite payments were now necessarily to be determined. But I think the present case is distinguishable from any of those in which that point has been decided in the creditor's favour. They were all cases of distinct insulated debts, between which a plain line of separation could be drawn. But this is the case of a banking account, where all the sums paid in form one blended fund, the parts of which have no longer any distinct existence. Neither banker nor customer ever thinks of saying, "This draft is to be placed to the account of the £500 paid in on Monday, and this other to the account of the £500 paid in on Tuesday." There is a fund of £1000 to draw upon, and that is enough. In such a case, there is no room for any other appropriation than that which arises from the order in which the receipts and payments take place, and are carried into the account. Presumably, it is the sum first paid in that is first drawn out. It is the first item on the

debit side of the account that is discharged or reduced by the first item on the credit side. The appropriation is made by the very act of setting the two items against each other. Upon that principle, all accounts current are settled, and particularly cash accounts. When there has been a continuation of dealings, in what way can it be ascertained whether the specific balance due on a given day has, or has not, been discharged, but by examining whether payments to the amount of that balance appear by the account to have been made? You are not to take the account backwards and strike the balance at the head instead of the foot of it. A man's banker breaks, owing him, on the whole account, a balance of £1000. It would surprise one to hear the customer say, "I have been fortunate enough to draw out all that I paid in during the last four years, but there is £1000 which I paid in five years ago that I hold myself never to have drawn out; and therefore if I can find anybody who was answerable for the debts of the banking-house, such as they stood five years ago, I have a right to say that it is that specific sum which is still due to me, and not the £1000 that I paid in last week." This is exactly the nature of the present claim. Mr. Clayton travels back into the account till he finds a balance for which Mr. Devaynes was responsible, and then he says, "That is a sum which I have never drawn for. Though standing in the centre of the account, it is to be considered as set apart and left untouched. Sums above it and below it have been drawn out; but none of my drafts ever reached or affected this remnant of the balance due to me at Mr. Devaynes's death." What boundary would there be to this method of re-moulding an account? If the interest of the creditor required it, he might just as well go still further back, and arbitrarily single out any balance, as it stood at any time, and say it is the identical balance of that day which still remains due to him. Suppose there had been a former partner, who had died three years before Mr. Devaynes, what would hinder Mr. Clayton from saying, "Let us see what the balance was at his death: I have a right to say it still remains due to me, and his representatives are answerable for it; for if you examine the accounts you will find I have always had cash enough lying in the house to answer my subsequent drafts; and therefore all the payments made to me in Devaynes's lifetime, and since his death, I will now impute to the sums I paid in during that period,—the effect of which will be, to leave the balance due at the death of the former partners still undischarged"? I cannot think that any of the cases sanction such an extravagant claim on the part of a creditor.

If appropriation be required, here is appropriation in the only way that the nature of the thing admits. Here are payments so placed in opposition to debts, that on the ordinary principles on which accounts are settled, this debt is extinguished.

If the usual course of dealing was for any reason to be inverted, it was surely incumbent on the creditor to signify that such was his intention. He should either have said to the bankers, "Leave this balance altogether out of the running account between us:" or, "Always enter your payments as made on the credit of your latest receipts, so as that the oldest balance may be the last paid." Instead of this, he receives the account drawn out as one unbroken running account. He makes no objection to it; and the report states that the silence of the customer after the receipt of his banking account is regarded as an admission of its being correct. Both debtor and creditor must therefore be considered as having concurred in the appropriation.

But there is this peculiarity in the case, that it is not only by inference from the nature of the dealings and the mode of keeping the account, that we are entitled to ascribe the drafts or payments to this balance, but there is distinct and positive evidence that Mr. Clayton considered and treated the balance as a fund out of which, notwithstanding Devaynes's death, his drafts were to continue to be paid. For he drew, and that to a considerable extent, when there was no fund, except this balance, out of which his drafts could be answered. What was there in the next draft he drew which could indicate that it was not to be paid out of the residue of the same fund, but was to be considered as drawn exclusively on the credit of money more recently paid in? No such distinction was made; nor was there anything from which it could be inferred. I should therefore say that on Mr. Clayton's express authority, the fund was applied in payment of his drafts in the order in which they were presented.

But even independently of this circumstance, I am of opinion, on the ground I have before stated, that the Master has rightly found that the payments were to be imputed to the balance due at Mr. Devaynes's death, and that such balance has by those payments been fully discharged: the exception must therefore be *overruled*.

Clayton's case is always cited as a leading authority upon the doctrine of the appropriation of payments. "Clayton's case," says *Abbott, J.* (afterwards Lord *Tenterden*), "was very fully argued. All the decisions were there before the Master of the Rolls, and he pronounced judgment against Clayton. It was a case decided upon great consideration, and is an authority of great weight." *Bodenham v. Purchas*, 2 B. & Ald. 46; and see *Taylor v. Kymer*, 3 B. & Ad. 333; *Brooke v. Enderby*, 2 Brod. & Bing. 70; *Williams v. Rawlinson*, 10 J. B. Moore, 371; *Wickham v. Wickham*, 2 K. & J. 489.

The law as to the appropriation, or (as it is termed in the Roman law) imputation of payments, arises in this way. Suppose a person, owing another several debts, makes a payment to him, the question arises, to which of those debts shall such payment be appropriated or imputed—a question often of considerable importance, not only to the debtor and creditor, but sometimes also to third persons. For instance, suppose A. owes to B. two distinct sums of £100 and £100, and A. could set up the Statute of Limitations as a defence to an action for the earlier of the two debts, but not to an action brought for the other, it is clear that if A. paid £100 to B., and it could be imputed to the earlier debt, B. could still recover from him another £100; whereas, if it were imputed to the later debt, he would be without remedy as to the

earlier. Again, suppose A. owes B. two sums of £500, for the first of which C. is a surety; if A. pays B. £500, and it is imputed to the first £500, C.'s liability will cease; if it be imputed to the other £500 the liability will, with the debt, still remain.

Appropriation by the Debtor.—

The first rule upon the appropriation of payments, (borrowed, as observed in the principal case, from the Roman law,) is that the debtor has in the first instance the option, at the time of making a payment, to appropriate it to any of the debts due from him to the creditor.

"Quotiens," says the Digest, "quis debitor ex pluribus causis, unum debitum solvit, est in arbitrio solventis dicere quod potius debitum voluerit solutum, et quod dixerit, id erit solutum." And it gives as a reason, "Possumus enim certam legem dicere ei quod solvimus." Dig. lib. xvi. tit. 3, l. 1. See also French Civ. Code, tit. 1253.

Our own law is well illustrated by an early case. It was as follows:—The defendant owed the plaintiff certain money upon a bond, and certain money for wares sold, as it appeared by his book. At the day when the money became due upon the bond, the defendant duly tendered the money according to the bond; the plaintiff accepted it, and said it should be for the debt due by his book, and not for the other debt; but the defendant said he paid it upon

his bond and not otherwise; and the plaintiff crossed his book, pretending the book debt to be discharged, and brought an action of debt upon the bond. And it was adjudged against him; for it was said "the payment is to be in that manner that the defendant would pay it, and not according to the words of the plaintiff how he would accept it." *Anon.*, Cro. Eliz. 68; See also *Bois v. Cranfield*, Sty. 289; *Pinnel's Case*, 5 Co. 117 b.; *Malcolm v. Scott*, 6 Hare, 570; *Smith v. Smith*, 9 Beav. 80; *Attorney-General of Jamaica v. Mander-son*, 6 Moo. P. C. C. 289, 255.

The intention of the person making the payment, as to the mode of appropriation, may not only be manifested by him in express terms (*Ex parte Imbert*, 1 De G. & Jo. 152), but it may be collected either from his conduct at the time when, or from the circumstances under which, the payment was made. For instance, where a creditor to whom several debts are due makes an application for the payment of one of them, and the debtor in consequence thereof makes a payment, it will be implied that it was his intention to appropriate it to the discharge of the debt in respect of which the application was made. Thus in *Shaw v. Picton*, 4 B. & C. 715, Messrs. Howard & Gibbs, attorneys, having themselves large demands against Lord Alvanley, upon bill transactions with himself, and also as agents for several other persons to whom Lord Alvanley had granted annuities, for which

Lord Foley was surety, caused an attorney to make an application to Lord Alvanley and Lord Foley on behalf of the annuitants, and Lord Alvanley, in consequence of that application and the remonstrances of Lord Foley, paid to Howard and Gibbs certain sums of money, without making any express appropriation of them at the time of payment. It was held by the Court of King's Bench that Lord Alvanley ought to be considered as having appropriated the payment on account of the annuitants.

In *Young v. English*, 7 Beav. 10, the plaintiff, an equitable mortgagee for £600, lent the title-deeds to the defendant English, the mortgagor, to enable him to arrange a sale of the property, upon an express undertaking that they were to be returned. English paid to the plaintiff £300 received by him as the first instalment of the purchase money, and afterwards became bankrupt. It appeared that English was, previous to the payment of the £300, indebted to the plaintiff on a trade account to a larger amount. It was contended by the plaintiff that as no application had been made by English of the £300 paid by him, the plaintiff had a right to attribute it to the trade account, thus leaving the equitable mortgage undischarged. However, Lord Langdale, M. R., held that the payment was to be understood as being made on the mortgage account. "In support of the plaintiff's claims," said his Lordship, "he alleges that nothing was said as to the application of the money which he re-

ceived; and he insists that, in the absence of express direction, he has a right to make the application most beneficial to himself. But it appears to me, from the *nature of the transaction*, that English paid this money only in respect of the plaintiff's right to the mortgage, and that it must, from the circumstances, be understood, that English meant the payment to be applied towards satisfaction of the mortgage." See also *Attorney-General of Jamaica v. Manderson*, 6 Moo. P. C. C. 239, 255.

Again, it has been laid down that "the payment of the exact amount of goods previously supplied is irrefragable evidence to show that the sum was intended in payment of those goods," per Lord *Ellenborough*, C. J., in *Marryatts v. White*, 2 Stark. 102.

So where a payment with discount is made to a creditor, it will afford a strong inference, (in the absence of proof to the contrary,) that the debtor intended to appropriate the sum paid, in discharge of debts within the time allowed for discount, and not in discharge of others the term of credit for which had expired. *Id.* 101. See also *Newmarch v. Olay*, 14 East, 239; *Taylor v. Kymer*, 3 B. & Ad. 320.

It was upon the same principle that the Roman law appropriated a payment to a debt which had become already due, in preference to appropriating it to one not due, and which consequently the debtor was not under any obligation to pay. "Quod si forte à neutro

dictum sit, in his quidem nominibus quæ diem vel conditionem habuerunt, id videtur solutum, cujus dies venit" (Dig. lib. xlv. tit. 3, l. 3, § 1). "Nam cum ex pluribus causis debitor pecuniam solvit, Julianus elegantissime putat ex ea causa eum solvisse videri debere, ex qua tunc cum solvebat, compelli poterit ad solutionem" (l. 103). *Mæcian. lib. ii., Fideicom.*

Where there is a subsisting demand between two parties, as for instance, where a customer is indebted in a particular sum to his banker, and the debtor makes a payment generally, it will be considered as a payment and not as a deposit. *Hammersley v. Knowles*, 2 Esp. 666.

Where several debts are due, some of which are barred by the Statute of Limitations, and some not, if a payment is made on account of principal or interest generally, the inference will be that the payment is made on account of those debts not barred by the statute. Thus in *Nash v. Hodgson*, 6 De G. Mac. & G. 474, A. gave three joint and several promissory notes to the plaintiff. Two were dated respectively the 29th September, 1839, and the 27th January, 1840, and another for £200 was dated the 12th of June, 1841. In the latter, A. was joined by B. (to whom he afterwards became an executor). The plaintiff, in December, 1846, "applied to A. for a payment on account of interest then due to her." On the 16th of that month he paid to her £5, as she alleged, "on account of interest generally."

She afterwards made an indorsement on the promissory note of 1841, that the £5 had been received "for interest due on this note." A claim was filed by the plaintiff, on the 16th September, 1850, for payment of the last-mentioned note against the executors of B. The question raised was whether the promissory note, which but for the payment of the £5 would previous to the filing of the claim have been barred by the Statute of Limitations, was taken out of its operation by such payment. It was held by the full Court of Appeal (reversing the decision of Sir *W. Page Wood*, V. C., reported *Kay*, 650), that the payment was attributable to the note of 1841, and that the effect of the payment was to prevent the operation of the Statute of Limitations. "What," said Lord *Cranworth*, C., "I deduce from the authorities is, that where a payment is made as principal, the effect of it will be to take out of the operation of the statute any debt which is not barred at the time of payment, but that it will not revive a debt which is then barred; and that where there are several debts, the inference will be that the payment is to be attributed to those not barred. What may be the effect where there is a single debt consisting of several items, some of which are barred and some not, may be doubtful. Exactly the same principle applies if the payment is made in respect of interest. I cannot therefore concur in the decision of the Vice-

Chancellor. It appears to me in this case that, there being three promissory notes, two barred and one not barred, and a payment made on account of interest generally, this payment must be attributed to the note which was not barred; and if this were not so, the only effect would be to treat it as a payment on account of all, so that in either case the £200 note would be kept alive."

Appropriation by the Creditor.—

The second general rule laid down upon this subject is that if the debtor do not make the appropriation, the creditor may do so. *Godard v. Cox*, 2 Str. 1194; *Bloss v. Cutting*, cited *ib.*; *Hall v. Wood*, 14 East, 243 n.; *Kirby v. the Duke of Marlborough*, 2 Mau. & Selw. 18; *Hutchinson v. Bell*, 1 Taunt. 564; *Dawson v. Remnant*, 6 Esp. N.P.C. 26; *Peters v. Anderson*, 5 Taunt. 596, 601; *Grigg v. Cocks*, 4 Sim. 438. And a court of law will recognize his appropriation in discharge of a purely equitable debt. *Bosanquet v. Wray*, 6 Taunt. 597; *Nash v. Hodgson*, 6 De G. Mac. & G. 474, 484. This rule we have adopted from the Roman law, according to which "quotiens non dicimus id quod solutum sit, in arbitrio est accipientis cui potius debito acceptum ferat." Dig. lib. xlv. tit. 3. l. 1.

We have not however adopted the restriction placed upon the second rule by the Roman law, namely, that the party receiving the payment must make an *immediate* appropriation of it (Dig. lib. xlv.

tit. 3, l. 1), inasmuch as, according to our law, the payee may make the appropriation at *any time* before the matter comes to trial, and he is not bound to give notice thereof to the payor. *Philpott v. Jones*, 4 Nev. & Mann. 16; 2 Ad. & Ell. 44; *Simson v. Ingham*, 2 B. & C. 65; as to the Scotch law, which is the same, see *Campbell v. Dent*, 2 Moore, P.C.C. 292.

If however a payee has made an act of appropriation which he has communicated to the payor, he cannot set up against it a subsequent act of appropriation. *Fraser v. Birch*, 3 Knapp, 880, 401; *Bodenham v. Purchas*, 2 Barn. & Ald. 39; *Bank of Scotland v. Christie*, 8 C. & F. 214.

Where there are two debts, the one lawful, and the other claimed upon a contract forbidden by law, the creditor, it seems, would not be allowed to appropriate a payment to the satisfaction of the unlawful demand. *Wright v. Laing*, 3 B. & C. 165; 4 D. & R. 783; *Ex parte Randleson*, 2 Deac. & Chit. 534; and see *Ribbans v. Crickett*, 1 B. & P. 264. Where, however, one of two debts is due, on account of a contract not absolutely unlawful, but upon which the creditor is prevented from suing by some statute framed for the protection of the debtor from particular actions and suits, the creditor may appropriate the payment to such demand and sue upon the other debt. Thus where two debts are due to a man, to the first of which the debtor might in an action successfully plead the Statute of Limitations, if he pay a

sum generally to his creditor without making any appropriation thereof, the creditor may appropriate it to payment of such debt, so that he might sue upon the other. *Mills v. Fowkes*, 5 Bing. N.C. 455; *Philpott v. Jones*, 2 Ad. & Ell. 41; and see *Costello v. Burke*, 2 J. & L. 665.

The same result follows where the right of action for one of two debts is barred by the Act regulating the sale of spirituous liquors on credit. *Cruickshanks v. Rose*, 1 Moo. & Rob. 100; *Philpott v. Jones*, 2 Ad. & Ell. 41.

Upon the same principle it has been held that where an attorney has claims in respect of costs against a Corporation, some of which he can enforce at law, and some of which he cannot recover, by reason of his appointment not having been made under seal, and money has been paid to him by the Corporation generally on account, he can appropriate such payments to the latter claims, because although they could not be the subject of an action at law, they are just and equitable. *Arnold v. The Mayor of Poole*, 4 Man. & Gr. 860, 897; 2 D.N.S. 574; 5 Scott, N. R. 741; see also *Lamprell v. Billericay Union*, 3 Exch. 283.

But although where there are two debts, one of which is barred by the statute, as for instance, the Statute of Limitations, the creditor, upon a payment being made generally, may appropriate it towards satisfaction of the debt already barred, still that appropriation will have no effect upon

the operation of the statute. Thus in the well-known case of *Mills v. Twikes*, 5 Bing. N.C. 455, a debtor who owed his creditor some debts from a period longer than six years, and others from a period within six years, paid to him a sum of money without appropriating it to any particular debt, it was held by the Court of Common Pleas that such payment was not a payment on account, to take out of the Statute of Limitations the debts due longer than six years, but that the creditor might at any time apply such payment to the debts due longer than six years. "Here," said *Tindal*, C. J., "as there was no appropriation, nor any evidence of an intention on the part of the debtor to apply the payment in part discharge of one of the earlier items, I think it has not the effect of exempting them from the operation of the statute. Then comes the question, has the plaintiff a right to apply that payment in satisfaction of the prior debt barred by the statute? For, though the plaintiff is bound by the statute with respect to his right to sue the defendant, yet where the debtor has made no appropriation of the money, the law as to its application remains the same as before. The civil law, it is said, applies the payment to the more burdensome of two debts, where one is more burdensome than the other; but I do not think that such is the rule of our law. According to the law of England, the debtor may, in the first instance, appropriate the payment,—"*solvitur in modum solventis*;" if he omit to do so, the credi-

tor may make the appropriation; "*recipitur in modum recipientis*," but if neither make any appropriation the law appropriates the payment to the earlier debt. The defendant here contends that, where the creditor fails to make any appropriation at once, the law will appropriate the payment to the more burdensome debt; but the decisions are clearly the other way. Thus in *Goddard v. Cox*, 2 Str. 1194, where the defendant being indebted to the plaintiff for coals delivered to his wife *dum sola*, and to himself after coverture, made a payment without any specific appropriation, it was held the plaintiff might apply the money in discharge of the debt contracted by the wife *dum sola*. Then in *Philpott v. Jones*, 2 Ad. & Ell. 41, where the debt was for goods and spirits supplied in quantities not amounting to 20s. at a time, for which the plaintiff was precluded from recovering by 24 Geo. II., c. 40, s. 12, the plaintiff was allowed to apply to the spirits an unappropriated payment made by the debtor; and Lord *Denman*, C. J., said he might so apply it at any time. In *Peters v. Anderson*, 5 Taunt. 596, where a debt was due from the defendant to the plaintiff on a covenant, and a debt on simple contract, and the defendant delivered goods in payment without appropriating them to either debt in particular, it was held that the plaintiff might appropriate them to the debt for which he had the worse security. In *Bosanquet v. Wray*, 6 Taunt. 597, it was held that a creditor receiving money

without any specific appropriation by the debtor, might be permitted in a court of law to ascribe it to the discharge of a prior and purely equitable debt, and sue him at law for a subsequent legal debt.

These cases show clearly that the receiver has a right to appropriate, if the payor omit to do so; and *Simson v. Ingham*, 2 B. & C. 65, that he may make the appropriation any time before action. *Best, J.*, was the only judge who said that the appropriation must be made within a reasonable time; but if that were necessary, it has been made within a reasonable time here. And this is not even the case of one debt being more burdensome than another, for if a debtor wishes to do what is just, there are many cases in which he will not set up the Statute of Limitations." See also *Williams v. Griffith*, 5 M. & W. 300; *Nash v. Hodgson*, 6 De G. Mac. & G. 474. We may therefore consider that *Meggot v. Mills*, 1 Lord Raym., 286, and *Dawe v. Holdsworth*, 1 Peake, N.P.C. 64, to be overruled.

Where one debt is certain, and another uncertain or disputed, as for instance, if there be a legal debt, and a claim which would only become a legal debt on a settlement of partnership accounts and a striking of a balance, the general payment will be applicable to the legal debt. *Goddard v. Hodges*, 1 C. & M. 33, 39; and see and consider *Burn v. Boulton*, 2 C. B. 476.

Upon the same principle, if two debts be due from a man, one from him as executor, the other from him in his own right,

and he make a general payment, the creditor will not be allowed to appropriate it in discharge of the debt due in his character as representative, for the validity of such demand may depend on the question of assets, and the manner of administering them. *Goddard v. Cox*, 2 Str. 1194. See Dig. lib. xlv. tit. 3, l. 3, § 1, and l. 108 Mæcian. lib. ii., Fideicom.

Where the demand of a creditor is entire, he will not be allowed to split it into two demands, and appropriate a general payment to the one which is most advantageous to him to be paid. Thus in *James v. Child*, 2 Cr. & Jer. 678, an attorney having delivered a bill containing taxable items, and charges not taxable, and a general payment was made on account, it was held by the Court of Exchequer that the attorney could not appropriate the payment in discharge of the taxable items and sue for the other charges without delivering a signed bill pursuant to the statute.

Appropriation by the Law when not made by the Debtor or Creditor.

—Where neither party makes an appropriation, the law will appropriate the payment to the earlier, and not, as the Roman law, to the most burdensome debt.

Upon these grounds, as was held in the principal case, where money is paid to one party on a general account, as for instance, a banking account, and no direction is given by the payor as to its appropriation, and no appropriation made by the payee, the money paid will go in discharge of the first

items on the other side. *Bodenham v. Purchas*, 2 B. & Ald. 39; *Taylor v. Kymer*, 3 B. & Ad. 333; *Ex parte Whitworth*, 2 Mont. Deac. & De G. 164; *Pemberton v. Oakes*, 4 Russ. 154; *Simson v. Ingham*, 2 B. & C. 65; *Brooke v. Enderby*, 2 Brod. & Bing. 70; *Sterndale v. Hankinson*, 1 Sim. 893; *Beale v. Caddick*, 2 H. & Norm. 326. See also *Hollond v. Teed*, 7 Hare, 50; and even where trust moneys have been paid into a bank to a trustee's own account, and cheques are drawn by him in a general manner upon the bank, the payments made by the bank will, as in the principal case, be imputed to the earlier items. *Pennell v. Deffell*, 4 De G. Mac. & G. 372.

Where debts due to a former partnership are agreed, upon the formation of a new partnership between a partner of the old and a new partner of the new partnership, to be transferred to the new firm, as part of the capital of the new partnership, against the debts due from the old partnership, the moneys received by the new partnership must, in the absence of appropriation by the customers or agreement between the parties, be applied in payment of the earlier debts of the old partnership. *Copland v. Toulmin*, 1 West, H. of Lords Cas. 164; 7 C. & F. 349; and see S. C. in Court below, 3 Y. & C. 625; *Jones v. Maund*, ib. 347; and see and consider *Pemberton v. Oakes*, 4 Russ. 154; *Wickham v. Wickham*, 2 K. & J. 478; *Beale v. Caddick*, 2 H. & Norm. 326.

Although, in ordinary banking accounts, as is laid down in the

principal case, the presumption arises that it was intended that the first item of the debit side of the account is to be discharged or reduced by the first item on the credit side, that presumption may be entirely varied by the particular mode of dealing, or any stipulation between the parties. Thus in *Henniker v. Wigg*, 4 Q. B. 792; 1 Dav. & Mer. 160, it appeared that the defendant Lionel Wigg borrowed from the plaintiffs, who were bankers, £1000, to pay off a balance due from him, on his account, to the National and Provincial Bank, and a bond for that sum was executed by the defendants Lionel and Herbert Wigg on the 10th January, and by the defendants Neriah Wigg the elder, Neriah Wigg the younger, and Edward Wigg on the 12th of January, 1837, with a condition simply for repayment of the £1000 and interest on or upon the 6th of April, 1837. Before the 10th January, Lionel Wigg had paid into the plaintiffs' bank two several sums; namely, £85 on the 3rd of January; £196 on the 7th; and on the 12th, £102. He had also paid £35 on the 11th. The defendant Lionel Wigg ceased dealing with the National and Provincial Bank, after paying to them £1294. 6s. through the plaintiffs' bank (which said sum of £1294. 6s. was the first item on the debit side of his account in the pass-book of Lionel Wigg, viz. on the 12th of January), but commenced a banking account with the plaintiffs, the first transactions being the payment by him into the bank of the said sums, before the date of the bond, which formed

the first items in his pass-book on the credit side. Between the opening of his account and his failure, at the close, on the 10th of September, 1840, when the balance was against him £1505. 17s. 11d., *the balance had been in his favour to a greater amount than was due upon the bond, both for principal and interest.* An action of debt on the bond being brought by the plaintiff against the defendants who had severally executed the bond, the plea was, "solvit post diem." And the question which was raised for the decision of the Court, upon a special case, was, whether the payments by the defendant Lionel into the bank beyond the amount of the bond, or still more, the balances exceeding its amount, ought to have been applied in discharge of the bond. It did not appear what was the precise nature of the agreement between the parties at the time of giving the bond. It was stated however in the case, that in the month of September, 1840, Herbert, in the presence of Lionel Wigg, expressed a hope that the bank would not stop his brother Lionel, as they had the security of the bond for £1000. In October following, the defendants Neriah and Edward expressly avowed their liability to pay £1000 on the bond. On the 7th of November following, the defendant Neriah wrote to the Manager a letter in terms which admitted his liability. Under these circumstances it was held by the Court of Queen's Bench that the plaintiffs were entitled to recover,

as it might, in default of express stipulation, be inferred from the language and conduct of the parties after the execution of the bond, that they intended the bond to stand as a continuing security. "It was contended," said Lord Denman, C. J., in delivering the judgment of the Court, "that, as the bond was executed by some of the defendants on the 10th of January, and by all on the 12th, the sum of £1294. 6s. above noticed must, from the date, have included the £1000 to secure which the bond was given; that the whole formed one account, and that an ordinary banking, in which, according to the language of Sir *W. Grant*, M.R., all the sums paid in form one blended fund, the parts of which have no longer any separate existence; and that 'it is the first item on the debit side of the account that is discharged or reduced by the first item on the credit side.' *Clayton's Case*, 1 Mer. 580, 572, and *Bodenham v. Purchas*, 2 B. & Ald. 39, in which case the doctrine of Sir *W. Grant* was fully adopted. And it is presumed that, generally speaking, and with reference to a case like that which he was considering more especially, the doctrine of that eminent judge admits of no doubt. But it is equally certain that a *particular mode of dealing, and more especially any stipulation between the parties*, may entirely vary the case; and that would be the effect in the present instance, if it should appear that this bond was given to secure the plaintiffs

against advances which they might from time to time make to the defendant Lionel. That would show that the amount of it was not to be brought into account like any other item, in the manner supposed by Sir *W. Grant*. What was the precise nature of the agreement between the parties at the time of giving the bond does not very distinctly appear. But the conduct and language of the defendants, or some of them, which we find detailed in the case, has a strong bearing upon this point. . . . From this evidence, which is expressly submitted to our consideration, we know not at what conclusion we can possibly arrive, except that this bond was given as a *continuing security*, and consequently has not been discharged." See also *Williams v. Rawlinson*, 10 J. B. Moore, 371; *Simson v. Ingham*, 2 B. & C. 65; *Jones v. Maund*, 3 Y. & Coll. Exch. Cas. 357, and note at p. 358.

The rule that where money is paid generally, without any appropriation, it ought to be applied to the first items in the account, is subject also to this qualification, that when there are distinct demands, one against persons in partnership, and another against one only of the partners, if the money paid be the money of the partners, the creditor is not at liberty to apply it to the payment of the debt of the individual: that would be allowing the creditor to pay the debt of one person with the money of others. *Thompson v. Brown*, 1 Mood. & Malk. 40.

Where a person is indebted to

another for principal and interest, and pays money to him generally, the payment will be in the first place appropriated in payment of the interest, and afterwards of the principal as far as it will go. See *Chase v. Box*, Freem. Rep. by Hovend. 261; *Crisp v. Bluck*, Ca. t. Finch, 89. So where one of two obligors in a joint and several bond had become bankrupt, and the obligee having by several dividends in the bankruptcy been paid twenty shillings in the pound upon the amount of principal and interest due at the date of the commission, also carried in a claim in respect of the same bond under a decree in a suit for the administration of the estate of the co-obligor, who had died, it was held by Lord *Cottenham*, C., that the amount due to the obligee, in respect of such claim, was to be computed by treating the dividends as ordinary payments on account, that is, by applying each dividend in the first place in payment of the interest due at the date of each dividend, and the surplus, if any, in reduction of the principal. *Bower v. Marrie*, 1 Cr. & Ph. 351.

The Roman law, which in this respect was the same as our own, says, "Si neuter voluntatem suam expressit, prius in usuras, id quod solvitur, deinde in sortem accepto feretur." Cod. Lib. viii. Tit. 53, l. 1. And even if the creditor declared that he had received the payment "on account of principal and interest," it would have been appropriated first in payment of the interest. "Apud

Marcellum, lib. xx. Digestorum, queritur, si quis ita caverit debitori, *in sortem et usuras se accipere*: utrum pro rata et sorti et usuris decedat; an vero prius in usuras, et si quid superest in sorte? Sed ego non dubito, quin hæc cautio *in sortem et in usuras*, prius usuras admittat; tunc deinde, si quid superfuerit, in sortem cedat (Dig. lib. xvi. tit. 3, l. 5, § 3). Nec enim ordo scripturæ spectatur, sed potius ex jure sumitur id, quod agi videtur" (*ib.* l. 6). See also French Civ. Code, art. 1254.

Where however a person has two demands upon another, one arising out of a lawful contract, and the other out of a contract forbidden by law, and the debtor makes a payment which is not specifically appropriated by either party at the time of payment, the law will appropriate it to the demand recognized by the law, and not to that which it prohibits. Thus in *Wright v. Laing*, 8 B. & C. 165, where (previous to the abolition of the usury laws) distinct sums of money were due to the creditor, one for goods sold, the other for money lent on a usurious contract, and a payment was made which was not specifically appropriated to either debt by the debtor or creditor, it was held by the Court of King's Bench that the law would afterwards appropriate such payment to the debt for goods sold. See S. C. 4 D. & R. 783.

Where there has been no appropriation by either party, and there is no reason why a debt should be

appropriated to one debt rather than another, it will be apportioned between them. Thus in *Favenc v. Bennett*, 11 East, 86, where a buyer was indebted to a broker for two parcels of goods, the property of two different persons, and he made a payment to the broker generally, which was larger than the amount of either demand, but less than the two together, upon the broker becoming insolvent, it was held by the Court of King's Bench that such payment ought to be equitably apportioned as between the several owners of the goods sold, who were only respectively entitled to recover the difference from the buyer. See also *Nash v. Hodgson*, 6 De G. Mac. & G. 474.

The Roman law is the same, "Illud non ineleganter scriptum esse, Pomponius ait, Si par et diem et contractuum causa sit, ex omnibus summis pro portione videri solutum." Dig. lib. xvi. tit. 3, l. 8; see also French Civ. Code, art. 1256.

Appropriation of Securities.—It may be here mentioned that where a security has been deposited, with a creditor generally, and the debtor afterwards becomes bankrupt, owing two debts, one of which is provable and the other not, the creditor may appropriate the security to the debt which is not provable. *Ex parte Hunter*, 6 Ves. 94; *Ex parte Harvard Cooke's Bank*, L. 147; *Ex parte Arkley*, *Ib.* 149; *Ex parte Johnson*, 3 De G. Mac. & G. 218.

THE GRATITUDE (MAZZOLA, *Master*).

Instance Court, Dec. 18th, 1801.

[REPORTED 3 C. ROB. ADM. REP. 240.]

BOTTOMRY BONDS.—HYPOTHECATION.—*Power of a master over his cargo in cases of distress:—A master may hypothecate his cargo on freight for repairs in a foreign port, such repairs being necessary for the prosecution of his voyage.*

This was a case of considerable importance to the interests of commerce, respecting the power of a master of a vessel to hypothecate his cargo on freight, in a foreign port, for the repairing of damages sustained by the ship at sea; such repairs being absolutely necessary to enable the ship to proceed on her voyage for the purpose of delivering the cargo according to the charter-party.

A statement of all the particular facts, together with the principal documents, will be found in the appendix, 3 C. Rob. Adm. Rep. (Append. No. 5, p. 29,) as abstracted from a very minute account of the proceedings in the Court of Lisbon, from the petition of the master made to that Court, up to the sentence recording the petition, survey, and estimate, etc.

Arnold and Robinson for the petition.

Putting out of the present discussion the justness of the account which has been the foundation of the bond, and the reality as well as the magnitude of the difficulties which gave occasion for it, as matters either not disputed, or if disputed, as fit to be settled, as the Court has intimated, by a reference to the Registrar and merchants, we are called upon to show by what authority of law the master of a carrier vessel can pledge the cargo, being the property of a general freighter, for the repairs of the ship. In cases not dependent on the necessities of navigation, it would be idle to contend for such a power. But in such cases adverting to the

peculiar situation in which a master is placed in times of danger, and to his known power over the cargo in other analogous cases, such as jactus and ransom, adverting to the principles of the maritime law, which impose on the master a particular trust, and require of him a responsibility in cases of emergency for the benefit of the owner of the cargo: it seems to follow as an essential provision of the same system, that he should have a power and authority over the cargo, adequate to the purpose of discharging his duty, and providing for a safe delivery of his cargo at the port of destination. Freight is not earned but on delivery; it is but reasonable on that ground, that when extraordinary exertion is necessary to effect that purpose on which his whole interest is made to depend, he should have so much authority as may be necessary to counteract the force of temporary accidents. Again, masters are forbidden, even in distress, to delay their voyage for want of money in a foreign port. They are indeed directed to write to the proprietors of the cargo, and supply themselves in that way, if it can be done without delay, but at the peril of answering for damages incurred by delay. This responsibility is enjoined upon them by the laws of Oleron,¹ which are in a peculiar manner incorporated into the maritime jurisprudence of this country, being copied into the Black Book of the Admiralty as part of its substance, and being continually referred to in the public instruments of later times³ (H. 6) as an important part of the maritime law of this country.

Such a responsibility must, at least, be provided with the means of conforming to it. Accordingly, by the express letter of the codes of all the States of Europe, the cargo is held up as a fund to which in cases of necessity the master is allowed to resort. The master may bind it for a ransom bill (*Consolato*, art. 287); or if he becomes a pledge for the payment, the cargo is liable for his redemption. He may throw it overboard to preserve the ship in

¹ Laws of Oleron, art. 23.—“Une marchant frett une nef et la charge, et la mett en chemin; et entre ceste nef en une port, et demeure tant que [denari] lui failient, le maistre puet bien envoyer en son pays, pour querir de l'argent; mais il ne doit perdre tempe, car s'il le faisoit, il est tenu à prendre aux marchands tous les dommaiges qu'ils auront; mais le maistre puet bien prendre des vins aux marchands, et les vendre pour avoir son estorement.

Et quant la nef sera arrivée à droitte descharge, les vins, que le maistre aura pris, doivent estre au feur mys, que les autres seront vendus, ne à greigneur feur ne à moindre. Et aura le maistre son frett diceulx vins comme il prendra des autres. Et c'est le jugement en cest cas.”

² “Contra leges maritimas et statutum d'Oleron.” “Juxta formam et statutum d'Oleron.”—*Black Book of the Admiralty*.

time of danger. He may sell a part in port to provide for the necessities of the ship, and enable him to continue his voyage. The *Consolato del Mare*,¹ art. 104, directs that if the merchant is present, having money, he shall lend it; if he has not money, the master may sell part of the cargo, giving him a lien on the ship for his security. The same power is given in the articles of the laws of Oleron before cited, and it is copied into the code of almost every State in Europe. It is true, the words of these ordinances describe a power to sell a part; but that is not to be taken as a less power than the power of hypothecation, but rather as a greater power including the other, and expressed in that form only because in the earlier stages of foreign commerce it would appear best adapted to obtain credit, inasmuch as a bond to be enforced in a distant country would not be so negotiable and so acceptable to a foreign merchant as the absolute sale and delivery of part of the cargo. Nor is this mere inference unsupported by fact. The Ordinance of Antwerp, art. 19, does incidentally mention the power of pledging in the same article: "Le maître du navire ne pourra vendre ni engager aucune marchandise tant qu'il trouvera argent au change ou grosse aventure. Pourra à toute extrémité vendre des marchandises chargées." The object of this article seems to have been to lay restraint on the master in ordinary cases; yet the power of engaging the cargo is forbidden only conditionally, and *sub modo*; and from the manner in which it is mentioned, it appears to have been considered as a more eligible mode of raising the necessary sums than an actual sale. In the same manner the laws of Sweden,

¹ Proceeding on the supposition that the merchants were on board, and having money: "Ancora è tenuto il patrone della nave, che se il mercante haverà denari, et che fussero in loco, che il patrone della nave avesse bisogno di esarcie o alcuna cosa che necessaria fusse alla nave, il mercante gli debba prestare in quel modo, che il nocchiero et gli altri mercanti conosceranno che si debbia fare, e per tale ragione tutti li compagni et prestatori che nella nave saranno si debbono tutti obligare al detto mercante; et se il patrone della nave, o gli compagni, o gli prestatori trovassino alcun huomo che gli prestasse, il sopradetto mercante non è tenuto di niente al loco prestare."—

105. Supposing that the merchants on board had no money: "Se il patrone della nave ha bisogno di denari e non ne trova come di sopra è detto, et che fussino in loco sterile, et che quelli denari avesse di bisogno per spacciamento della nave, et se gli detti mercanti non hanno denari, loro debbono vender della lor mercantia per spacciare la nave, et nessuno prestatore nè compagno non possono dir niente, nè contrastare, insino che que' mercanti sieno pagati, salvo che gli salari di marinati. Imperò è da intendere, che il mercante veda et conosca che quello che lui presterà, sia per spacciamento della nave et necessario della nave."

having forbidden the master to sell more of the cargo than should amount to a fourth part of the value of his ship, prescribe a punishment if he exceeds : " Si petulanti modo vendat vel oppignat navem et bona in universum, ille non modo tenebitur resarcire exercitoribus et conductoribus omnia damna, sed etiam pro delicto suo plectetur" (Jus. Marit. Suec. tit. 4, c. 2, §§ 1, 2). In the same manner later writers speak of the power of hypothecating the cargo in cases of need as the known law. Molloy, vol. i. p. 384. Bynkershoek, in a treatise on bottomry, describes it, " contractus quo tota navis et partes, et si hoc actum est, etiam onus pro pecunia erogata pignori ponitur. Hæc omnia obligavit magister et obligare potuit" (Q. Jur. Priv. l. 3, c. 16). In the common law-books of this country it appears to have been the settled understanding of the Court of King's Bench in the beginning of the last century (*Justin v. Ballam*, 1 Salk. 34), and it is adverted to by modern writers of high authority, as continuing to be the law at this day. Park, p. 413. In addition to these authorities, it is found to have been the constant practice of this Court to proceed upon such bonds; and numerous instances are produced in a list that has been looked up since this question was first agitated, in which money has been paid out of the Court on bonds enforced against the cargo. On these grounds, the bondholder having lent his money under a security sanctioned by all ancient principle, recognized by constant usage and practice, and not vitiated by any misconduct appearing in the transaction, is entitled to the authority of this Court to enforce the payment of his debt.

The *King's Advocate, Lawrence, Swabey, Adams*, for the proprietors of the cargo.

On a question of great importance to the mercantile world, in which the possible mischief arising from an abuse of the power contended for might be immense, it was to be expected that some very cogent and direct authority would have been produced in support of such a demand. Excepting the list that has been extracted from the Registry, of which it does not appear that any one case was a contested case, it may be safely affirmed that nothing in the nature of a judicial precedent has been produced. It may be taken therefore as an admitted fact, that no such authority exists. To supply this deficiency, reference has been made to authorities of another nature, drawn indirectly from principles which govern analogous cases, as they are called, and from the loose dicta of ancient foreign ordinances

and writers on these subjects. Such authorities, at best, are but very unsatisfactory in cases of great importance. They will appear still further weakened by the observations that may be made upon them. The cases of ransom and jactus depend on other principles, arising out of urgent and instant danger, in which the titles of property are sacrificed, with every other consideration, to the preservation of human life. As to cases of authority exercised over the cargo, deliberately and in safety, in a foreign port, the utmost that is directly sanctioned is a power to sell a part; but this arises from principles very different from those which have suggested this action, and leading to consequences very different from what the proprietors of this cargo will suffer if the demand can be maintained. The master is the appointed agent of the owner of the ship, and, as such, competent to bind him in many instances. He is bound to consult the benefit of the owner of the ship as to the best means of accomplishing his voyage. The ordinance of the Hanse Towns, tit. 6, art. 2, Emer. v. 2, p. 432, contains a minute description of his duty in such situations, and, as we submit, prescribes the proper limitation of his power. If he is in want of repairs, “*et istic loci nullum cambium ad exercitores transmittendum obtinere queat, aut etiam in navi nulla bona habeat, quæ meliori cum commodo exercitorum, quam pecunia sub fœnore nautico excepta vendere possit; tum hoc in casu necessitatis, pro servandâ navi et bonis, habeat potestatem, nomine universorum exercitorum, tantum pecuniæ sub fœnore nautico accipiendi, quantum ad reparationem damni et alios similes casu necessitatis opus habet; et taliter quicquid fœnori accepit, universi exercitores solvere tenebuntur.*” The whole of his discretion is supposed to be exercised *pro meliori commodo exercitorum*; but he is not entitled to lay any burden on the owners of the cargo. If his ship is disabled by accident and storms from proceeding, he is not bound on their account either to tranship or to repair. It is said that he may repair or that he may tranship, but the law lays no obligation upon him to do either. If he judges it for the advantage of his owner, various modes of raising money are offered to him, and he may so far meddle with the cargo as to sell a part; but not as agent for the proprietor, or as engaging him in the repair of the ship, but as making a forced loan, as it is termed, for the benefit of his employer; and for which the proprietor of the cargo is to be ultimately indemnified, at the price at which the remaining articles sell at the port of their delivery. In no case was it designed that the proprietors of the cargo

should suffer for the repairs of a ship to which they are strangers, and under the direction of a man for whom they are in no degree responsible. The sale of a part would be easily compensated to them by the value of the ship and freight; and according to some ordinances, the master was himself personally liable to them (Em. v. 2, p. 445). Of a very different nature and extent is this power of hypothecating the whole cargo, by which the burden of repairing the damages of the ship may be, in the event, thrown upon the cargo; and by which all distinctions of general and particular average may be overturned, and the whole expense be thrown as a particular average upon a person no way interested in the vessel. Neither the Consolato nor any later codes mention such a power. If there are instances in which writers appear to attribute such a power to the master, they will be found to be instances relating to cases where the master is also the consignee of his owner, and the *dominus mercium*, as well as the master of the ship. There is a passage in Targa which points strongly to such a combination of interests, as necessary to support such an act of authority exercised by the master over the cargo:—"Quando il capitano ò essercitori imbarcano robbe e merci di proprio conto, puono prender danari a cambio maritimo supra corpo e merci *giuntamente*, perchè hanno la dispositione dell'una et l'altra materia; ecchi le dà, hà hypotheca più ampla" (c. 32, n. l. Erm. p. 477). When the interests were several, as the necessary interpretation of this passage seems to imply, no such power could exist to bind the property of another person. Bynkershoek also, in the passage cited, seems to refer to a situation where the ship and cargo belonged to the same person; at least it is far from appearing that he meant to assert that the master, *qua* master, was empowered to hypothecate the cargo of a general freighter for the repairs of his ship.

Having been speaking of the origin of bottomry, and the simple form in which it continued till the middle of the seventeenth century, as a power given to the master in distress to hypothecate the vessel:—"Ita tamen ut duntaxat de navi dominus teneatur, non ultra," Bynkershoek goes on, "ad solos magistros, et solas, ut dixi, naves obligatas pertinebat hæc causa mutui sed deinceps protracta est ad exercitores sive dominos, et mox etiam ad dominos mercium." So far the powers are described severally according to the several interests. It is not said that by the latest extension the master was considered as competent to bind the goods, as *dominus mercium*. In a follow-

ing passage, discussing the personal responsibility of the master, he decides against it: "*Nisi magister sit inter ipsos exercitores, vel onus pro parte ad ipsum pertineat.*" In this instance there was clearly a combination of interests, which, it is not improbable, continued to be in the contemplation of the writer during the next page, from whence the passage cited on the other side is taken, if in fact the words "*hæc omnia obligare potuit,*" are to include the *onus* mentioned in the preceding sentence. He had been just before referring to some case decided in the Council of Holland, in which the fact might be, that the master was part owner of the cargo; or perhaps, as is more probable, the cargo might not be amongst the things hypothecated; for he begins the whole paragraph, "*Dixi et naves, et instrumenta navium pignori dari,*" adverting only to the ship; and he concludes immediately after the sentence relied on, "*Hæc omnia instrumenta, salva creditoribus, non magistro vel exercitoribus;*" as if his consideration were directed solely to the case of hypothecation of ship and furniture. The other authorities that have been cited will be found in the same manner irrelevant. Molloy relies entirely on the Article of Oleron, and far exceeds his authority in the *dictum* which he advances on the subject. In the same manner the citation from Salkeld is a mere *dictum* of the reporter, not suggested by any of the circumstances of the case, nor depending, as far as it appears, on anything that fell from the Court; the same case being reported by Lord *Raymond* without any such observation. The passage from Mr. *Parke* rests solely upon Salkeld. The list that has been extracted from the registry contains no instance of an adjudged case, and therefore cannot be conclusive.

Upon this view of the argument, it is not too much to say that nothing has been produced that can have the force of direct authority to support this demand. It is in its consequence of momentous importance to the interests of commerce, and may be pregnant with incalculable mischief, if a power so easy to be abused should fall into the hands of fraudulent or improvident persons.

Arnold and *Robinson* in reply.

As far as the policy and probable effect of the law are to be considered, it would not be difficult to show that the power in dispute could operate only beneficially for the interest of the proprietors of the cargo. The master's power, as an absolute power convertible to purposes of fraud, would in no degree be increased by it. The cargo, in all cases where no supercargo is on board, must be in his

possession, and subject, as a possible accident, to misapplication and abuse. The inducement which the allowance of the authority in question would afford, would lead him to come back with his accounts, and submit them to the eye of his employer and the strict investigation of a Court of Justice; a temptation as little likely to suggest measures of fraud as any that can be conceived. But were the opportunity of abuse greater, would that impeach the soundness or necessary utility of a general principle? or can it be supposed that this danger is predominant over every other consideration of maritime jurisprudence; when as far as the not inconsiderable value of a ship extends, that is allowed to be subjected to this danger by every code that exists? The great object of the law of bottomry is to secure the arrival of the ship and cargo at the port of destination. To this end, a power to sell the ship in a foreign port could not have conduced, and was accordingly never entrusted to the master. His power over the ship is specifically limited to the power of hypothecation. His power over the cargo is described in general terms to be a power to sell a part, but not as excluding the power of hypothecation in the same manner as the power of selling the ship is excluded; for the same reason does not apply. The final success of the voyage never could be frustrated by such an alternative as to the cargo. In the ancient state of commerce, when intercourse with foreign nations was more limited, hypothecation would not be so good a security to the foreign merchant as the sale and delivery of a part, and therefore in the simple language of ancient codes, the most obvious remedy was alone described, not as excluding, but rather including, the alternative of hypothecation, as a milder remedy where it could be effectual. Where it can be applied, it is undoubtedly a milder remedy, inasmuch as it ensures, or tends to ensure, the arrival of the whole adventure at its proper port; and thereby provides, that if a sale of a part is ultimately necessary, it shall be conducted to the best advantage, in the market for which it was assorted, and in the hands of the proprietors or consignees. Such a modification is not only to be inferred from the spirit of the ancient codes, and the nature of the subject, but is incidentally expressed in some of them in terms that are too clear to be misunderstood. The regulations of Antwerp use the words, "ni vendre, ni engager;" and the laws of Sweden, making no use of the expression "oppignare," as to the amount to which the master's power to sell was allowed, but passing by that probable contingency without any observation, or

without providing any punishment for it, as for an abuse or extension of his power, expressly declare, as to a larger amount, "Si petulantimodo, . . . vendat vel oppignat;" he shall be responsible to the owner and freighter, "exercitoribus et conductoribus," etc.

The express prohibition of hypothecating as well as selling ship or goods beyond the fourth part of the value of the ship, connected with the omission of any mention of hypothecating within the limits prescribed for selling, justifies us in supposing that, as far as the master was allowed to sell, he was not prohibited from hypothecating. It appears also that he was equally free to act in this manner with respect to the goods, whether they belonged to the owner of the ship or not; for his responsibility being put severally, when he was responsible, "exercitoribus vel conductoribus;" when he was not responsible (that is, either for hypothecating or selling within the prescribed limits), it would be to the same several interests, to his owner or freighter, that no responsibility was due. It cannot therefore be maintained, that in all cases universally, where a power over the cargo was attributed to the master, it was in contemplation of an union of interest in his employer. Indeed, the whole of that hypothesis seems to be unfounded. It is built upon a passage in Targa; but that passage does not relate to bottomry, properly considered, as the resource for cases of distress in a foreign port. It applies to the *contrat à la grosse*, at the commencement of the voyage in the port of the proprietors, and is rather to be taken as a contract on *respondentia*. The passage is so cited by Emérigon, in his chapter *Contrat à la grosse*, having been passed over without notice in the preceding chapter, where the writer is treating expressly of the power of the master to sell part of his cargo in a foreign port. The same observation applies to the argument from Bynkershoek. He is evidently speaking in some parts of the chapter on bottomry, of bonds given in the port of departure, which, as to the cargo, must be bonds on *respondentia*; on this account he may have delivered himself with less perspicuity than is generally natural to him. But in the passage cited, the cargo is expressly included, as being under the power of the master; and the obvious sense of his terms imports it to have been his opinion, that the master, as master only, was, on particular emergencies, competent to bind the cargo. On any other supposition, if he had been the owner of the cargo, or the constituted agent of the ship and cargo, there would have been no reason for any order or limitation in the manner of doing it; he might have

elected his remedy, either on ship or cargo. Instead of that, it is now put subject to the prior hypothecation of the ship, "*Si hoc actum est, etiam onus pro pecunia erogata pignori ponitur.*"

Another argument has been built on a supposition that the master was bound only to act for the benefit of the ship; that he was not called upon to act for the cargo; that the law did not authorize him to bind the proprietor of the cargo; and that his power to sell a part, was understood only as a power to make a temporary loan, for which the proprietor must in all instances be indemnified. It has been before observed, that the master is in some cases made responsible to the owner of the cargo for the delay of his voyage arising from distress. It will be a sufficient answer to the latter part of this agreement to say, that the fact of a supposed indemnification in all cases cannot be maintained. It appears that a difference of opinion has existed in writers and in codes on this point. The laws of Wisbuy had provided for such an indemnification, and directed, "*Le navire venant à se perdre, le maître sera néanmoins tenu de payer au marchand les susdites marchandises.*" Valin and Pothier seem to have concurred in this opinion; but Emérigon opposes them, on the ground that in the older and more general codes it never had been so established, and he cites against them the article of the Consolato, 105, and says, "*Il ne réserve aux propriétaires des marchandises vendues qu'un simple privilège et préférence, sur le navire.*" He cites also the 23rd article of Oleron, and the 19th Règlement d'Anvers, to the same effect, and he concludes a following chapter by giving his opinion on a case so similar to the present, that, excepting the difference of sale and hypothecation, it is directly in point. From that opinion we learn, that it by no means appeared monstrous or unreasonable to one of the best writers on maritime law, that, in some extreme cases, the repairs of a ship, for the prosecution of the voyage, might be greater than the proceeds of the ship and freight, and that on such an occasion a loss might eventually fall upon the cargo, very consistently with sound principle and the general interests of commerce. "*Si au lieu de prendre des derniers à la grosse, le capitaine avoit vendu pour cause légitime*" (which could only be distress in a foreign port) "*une partie des marchandises du bord, et que, au retour du voyage, le navire et le fret (aggravés par des engagemens postérieurs et par les salaires de l'équipage) fussent insuffisans pour rembourser le prix des dits marchandises, cette partie devoit être supportée au sol la livre par*

les autres marchandises.” And further : “Celui dont les effets sont vendus, pendant le voyage, pour les nécessités de la navigation, n’a pu ni s’y opposer ni se procurer aucune ressource particulière contre la personne du capitaine. Il est donc juste qu’en cas d’insuffisance du navire et du fret, abandonnées par les propriétaires, la perte soit régalée sur l’universalité des chargeurs, dont la condition doit être égale.”

JUDGMENT.

SIR W. SCOTT. — This case has been learnedly argued ; and I have thought it due not only to the arguments, but also to the extreme importance of the question, as affecting the commerce of this country, to take some time for deliberation in forming my judgment upon it.

The case comes on upon petition, which states, “That the imperial ship ‘The Gratitude,’ having on board a cargo of fruit, and bound from Trieste, Zante, and Cephalonia to London, met with extremely tempestuous weather, and sprung a leak, whereby the cargo sustained considerable damage ; that the master was obliged, for the safety of the ship and cargo, and for the preservation of the lives of the crew, to put into Lisbon and unlade ; that the master applied for advice and assistance to F. Calvert, who was the correspondent of Mr. Powell, one of the principal consignees in England ; that Mr. Calvert wrote a letter to Mr. Powell, advising him of the misfortune which had befallen the cargo, and the steps which had been taken, and desiring his directions for their further conduct ; that in answer to that application he received a letter from Mr. Powell, stating ‘that to the master it belonged exclusively to adopt every necessary measure for the preservation of the cargo ; and that if it was necessary to unlade, the master alone was to judge of the propriety of such a measure.’ That the master, being in want of money to defray the charges of repairing the vessel and of unloading the cargo, borrowed of the aforesaid F. Calvert the sum of £5273. 12s. on a certain bottomry bond, bearing date 31st January, 1801, binding the ship and appurtenances, cargo and freight, to pay the said sum of £5273. 12s. within twenty-four hours after the arrival of the said ship in the port of London, or any other port ; that the said bond had been duly presented to the master, who refused to discharge it ; that the holder had no other means of recovering his debt than by proceeding against the ship, freight, and cargo, and prayed the Court

to decree a monition against the bail given to answer the action in respect of the cargo and freight, for payment of the balance due, after payment of the proceeds of the sale of the ship."

On the other side it is alleged, "that the master had not, *under the circumstances stated*, a right to hypothecate the cargo for the repairs of the ship, for payment whereof the ship, her master, owners, and freight are liable; that the cargo is by law only subject to pay an average proportion of the charges, to which the cargo laden in the said ship was liable, for the unlading and re-shipping the cargo, and other expenses relating thereto; all which, with the freight, the parties had always been and were willing to pay."

The proposition contained in the act does not go the length of asserting universally that the master has not a right to hypothecate his cargo in any possible case, but denies the power of the master to hypothecate it under the circumstances of this particular case. In the course of the discussion, however, the argument has been carried to the entire extent, and it has been contended that the master has no right to bind the owners of the cargo in any case,—upon this ground, that although he is the agent and representative of the ship, and by virtue of that relation may bind the ship and its owners, he is not the agent of the proprietors of the cargo, and therefore cannot bind it. It is said that he is the mere depository and common carrier as to the cargo, and that the whole of his relation to the goods is limited to the duties and authorities of safe custody and conveyance. This position, that in no case has he a right to bind the owners of the cargo, is, I think, not tenable to the extent in which it has been thrown out; for though in the ordinary state of things he is a stranger to the cargo, beyond the purposes of safe custody and conveyance, yet in cases of instant, and unforeseen, and unprovided necessity, the character of agent and supercargo is forced upon him, not by the immediate act and appointment of the owner, but by the general policy of the law; unless the law can be supposed to mean that valuable property in his hand is to be left without protection and care. It must unavoidably be admitted that in some cases he must exercise the discretion of an authorized agent over the cargo, as well in the prosecution of the voyage at sea, as in intermediate ports into which he may be compelled to enter.

The case of throwing overboard parts of the cargo at sea is of that kind. Nothing can be better settled than that the master has a right to exercise this power in case of imminent danger. He may

select what articles he pleases; he may determine what quantity—no proportion is limited—a fourth, a moiety, three-fourths, nay, in cases of extreme necessity, when the lives of the crew cannot otherwise be saved, it never can be maintained that he might not throw the whole cargo overboard. The only obligation will be, that the ship should contribute its average proportion. It is said this power of throwing over the whole cannot be but in cases of extreme danger, which sweeps all ordinary rules before it; and so it is. So, likewise, with respect to any proportion, he can be justified only by that necessity,—nothing short of that will do. The mere convenience of better sailing, or more commodious stowage, will not justify him to throw overboard the smallest part. It must be a necessity of the same species, though perhaps differing in the degree.

Another case is that of ransom, in which it is well known that, by the general maritime law, a master could bind by his contract the whole cargo as well as the ship. He could not go beyond the value of the goods; but up to the last farthing of their entire value, there is not a doubt but he might bind the cargo as well as the vessel. A very modern regulation of our own private law, founded on certain purposes of policy, has put an end to our practice of ransoming; but I am speaking of the general maritime law and practice, not superseded by private and positive regulation.

There are instances of authority at sea, there are other cases also in port, in which the master has the same authority forced upon him. Suppose the case of a ship driven into port with a perishable cargo, where the master could hold no correspondence with the proprietor; suppose the vessel unable to proceed, or to stand in need of repairs to enable her to proceed in time: in such emergencies the authority of agent is necessarily devolved upon him, unless it could be supposed to be the policy of the law that the cargo should be left to perish without care. What must be done? He must in such case exercise his judgment, whether it would be better to transship the cargo, if he has the means, or to sell it. It is admitted in argument that he is not absolutely bound to transship; he may not have the means of transshipment; but even if he has, he may act for the best in deciding to sell. If he acts unwisely in that decision, still the foreign purchaser will be safe under his acts. If he had not the means of transshipping, he is under an obligation to sell, unless it can be said that he is under an obligation to let it perish.

With respect to practice, I understand from a gentleman very conversant with the commerce of the West Indies, that it is by no means unfrequent for an application to be made to the Vice-Admiralty Courts in that part of the world, for leave to empower the master to sell. I understand it likewise to be matter of complaint, that this power is sometimes abused by an improvident and collusive sale of cargoes, when no real necessity exists; that is, in other words, that the power is usurped in cases where the party does not legally possess it. But the very ground of the defect of power in such cases implies and affirms its existence in cases where the necessity is real.

In all these cases, the character of agent, respecting the cargo, is thrown upon the master by the policy of the law, acting on the necessity of the circumstances in which he is placed. But it is said that this can only be done for the immediate benefit of the cargo, and not for the repairs of the ship. It is very true that this involuntary agent ought, like an appointed agent, in all cases to act for the best respecting the property, even in the case of a universal *jactus*, which appears less likely to conduce to the benefit of the cargo, still it is so; the ship is compelled in that case to pay an average, by which means the little which is to be taken as a remnant of the cargo is preserved; whereas otherwise both ship and cargo would have been totally lost. In the case of ransom, what was intended for the benefit of the cargo may eventually consume the whole. The proprietor will not be benefited in such a case, but he cannot be damnified. He will have had the chance of advantage without the danger or possibility of loss, for he cannot suffer beyond the value of the cargo, which, without such ransom, would have gone to the enemy *in toto*. It is the same consideration which founds the rule of law that applies to the hypothecation of a ship. In all cases it is the prospect of benefit to the proprietor that is the foundation of the authority of the master. It is therefore true, that if the repairs of the ship produce no benefit or prospect of benefit to the cargo, the master cannot bind the cargo for such repairs. But it appears to me that the fallacy of the argument that the master cannot bind the cargo for the repairs of the ship, lies in supposing that whatever is done for the repairs of the ship is in no degree, and under no circumstances, done for the benefit or with the prospect of a benefit to the cargo; whereas the fact is, that, though the prospect of benefit may be more direct and more immediate to the ship, it may still be for the preservation and conveyance of the cargo,

and is justly to be considered as done for the common benefit of both ship and cargo.

Suppose the cargo to be not instantly perishable, but that it can await the repair of the ship, what is the master to do in the situation before described ; being a stranger in a foreign port, in a state of distress, without an opportunity of communicating with the owners or their agent ? What is his duty under such circumstances ? It may be answered generally, to look out for the means of accomplishing his contract if possible ; that is, the safe conveyance of the property entrusted to his care, in that same vehicle which he had contracted to furnish. It is admitted, that though empowered to transship, he is not bound to transship. No such obligation exists according to any known rule of the maritime law ; and if it did, still he must be affected with the opportunity of transshipment, and with wilful neglect of such opportunity, for wilful neglect shall not be presumed. He may even be restrained from transshipment, if he has the means by knowing that insurances were made on the original shipment, which might be avoided by such a change, on having the general duty of carrying the cargo to the place of destination imposed upon him, not being obliged to transship, and it not being shown that he has the opportunity of transshipment, he must be presumed to look out for the means of repairing his ship for the accomplishment of his contract. The first and most obvious fund for raising money is the hypothecation of the ship. But the foreign lender has a right to elect his security, for he is not bound to lend at all. He may refuse to lend upon the security of the ship or on that security alone ; it is no injustice on his part, and if he does so refuse, the state of necessity still continues.

The security of the ship not being sufficient, and the master not being able to raise money on that alone, what is he to do ? It cannot be said that he is in all cases to wait till he hears from a distant country. The repairs may be immediately necessary ; it may be hoped that the repairs will be far advanced before he can hear from the consignees. The master may not know the proprietors at all, but only the consignees ; they may be mere consignees, and have no power to direct him, but in a single case of an actual delivery to them. If owners, they may be very numerous ; for in a carrier-ship there may be a hundred owners of the cargo, and the master may be in danger of receiving a hundred different opinions, supposing it were possible for him to apply to all. What does the necessity of such a case offer to be done ? I conceive one of two

things : to sell a part of the cargo, for the purpose of applying the proceeds to the prosecution of the voyage by the repair of the ship ; or to hypothecate the whole, for the same purpose. With respect to the former, the books overflow with authorities, many of which have been stated. They all admit that he may sell a part ; some ancient regulations have attempted to define what part, others have not. The general law does not fix any aliquot part, and indeed it is not consistent with good sense to impose a restraint, or to fix any limitation to measure a state of things which seems to arise from necessity. It must, generally speaking, be adequate to the occasion. One limitation, however, the policy of the law necessarily prescribes,—that the power of selling cannot extend to the whole, because it never can be for the benefit of the cargo that the whole should be sold to repair a ship which is to proceed empty to the place of her destination ; there will in that case be no safe custody and transmission, and therefore the power of selling for the repairs of the ship must be limited to the sale of a part, though it may not be possible to assign the exact part, except where positive regulations have fixed it.

But hypothecation may be of the whole, because it may be for the benefit of the whole that the whole should be conveyed to its proper market ; the presumption being that this hypothecation of the whole, if it affects the cargo at all, will finally operate to the sale of a part, and this in the best market, at the place of its destination, and in the hands of its proper consignees. In the unfortunate case before us, in which there has been such a combination of calamitous circumstances as can hardly be expected to happen again, the loss of a part of the whole sold, in the hands of its proper consignees, is all the effect that will be produced ; and it can hardly ever happen that the hypothecation will reach the total value of the cargo. On the other hand, the safe conveyance of a valuable cargo may be, in many instances, of infinitely more value to the merchant than the whole expense of the repairs, if the whole could be devolved on the cargo. Generally it cannot be so ; in the very form and structure of the bonds, the ship and freight being usually the first things that are hypothecated ; but if it were to happen that they were omitted in the literal terms of the bonds, still they would be liable in contribution to the extent of their value, although the cargo alone had been made immediately answerable to the foreign lender, who has nothing to do with averages of any kind. On principle, therefore, the right of hypothecation of

the whole cargo is extremely natural; and if I am right in considering it as equivalent to a sale of a part, it is little more than what all the books of maritime jurisprudence direct to be done. It is, in truth, but a power to make a partial sale, conducted with greater probability of ultimate advantage to the whole; for as all must finally contribute in the case of an actual sale of a part, what new hardship is now imposed? (See *Duncan v. Benson*, 1 Exch. 558.) All contribute in this, as a portion of the whole value of the cargo is abraded for the general benefit, probably with less inconvenience to the parties than if any one person's whole adventure of goods had been sacrificed by a disadvantageous sale in the first instance.

Cross accidents may intervene in the sequel, to make the contract of hypothecation less beneficial than might have been expected at the time. In the present case, the ship was estimated, by public authority at Lisbon, at £2300; the freight amounted to as much; the sum to which it is admitted the cargo is liable for its own proper charges, would have made up almost the whole of what remained, so that a very small part of the cargo would have been affected. It has happened, by subsequent accidents, that the matter has turned out so as to affect a larger portion of the cargo; but subsequent accidents, as it was observed in argument, cannot invalidate the original contract. The worst that can happen, and this only by the most perverse combination of circumstances, is, that the whole value of the cargo might be answerable; still I should say, speaking with all caution that is due on such important interests, better is it that this should happen (if it can happen) in a few very eccentric and almost unnatural instances, than that the master should have no discretionary power to act for the preservation of the cargo, but that he should be compelled, in all cases and under all circumstances, to proceed to the sale of possibly a considerable portion of his cargo, at a most improper port for which his cargo is not adapted, as a distressed man, and as a man whose distresses are known to every person who has to deal with him in the purchase of those parts of his cargo.

An extreme case has been put by the King's Advocate, of a large and valuable ship, with a cargo of inconsiderable value, belonging to Dover, and falling into this distress in a neighbouring port, as at Calais: and it is asked if it would be reasonable to consume a small cargo in the service of a ship so situated? It may be sufficient to answer, that it is not the case before the Court, and that it differs from this case in the exact proportion of the difference of the distance between London and Lisbon, and of that between

Dover and Calais. Supposing such a case, it would be expected, undoubtedly, that the master should use his utmost endeavours to correspond with the consignees or proprietors. But a case of instant necessity might occur even so near; the master might not be able to receive their directions; all communication might be interrupted, as it is sometimes, for a fortnight, or three weeks or more, in adverse or tempestuous weather, and then the same principle would apply. But whatever might be the objection to such a case, just the same objection would lie against the known and admitted power of the master to hypothecate the ship, supposing the owner of that ship to live at Dover. If necessity was urgent, even that extreme case would come under the operation of the same principle.

So much upon mere principle. How does the matter stand with regard to authorities? In the first place, it is not improper to observe that the law of cases of necessity is not likely to be well furnished with precise rules. Necessity creates the law,—it supercedes rules; and whatever is reasonable and just in such cases is likewise legal. It is not to be considered as matter of surprise, therefore, if much instituted rule is not to be found on such subjects. In the next place, if I am right in considering hypothecation of the whole as equivalent to the sale of a part, then all authorities for a partial sale are authorities also for a total hypothecation. Thirdly, I must observe that it is not to be expected that the ancient codes should contain much precise regulation or direct authority on this subject, this contract of bottomry being comparatively of later growth, and arising out of the necessities of an enlarged commerce. Bynkershoek expresses himself, I apprehend, with great historical accuracy on this subject, when he says:—“*Origo hujus contractus ex jure Romano, sed quæ ibi legimus vix trientem absolvunt totius argumenti. Adeo tenuia etiam apud nos fuerunt ejus contractus initia, ut non nisi mutuum significaverit, quo magistro peregre agenti permissum est, navem ex causa necessitatis obligare.*” But still I think authorities are not wanting from the ancient codes. The passage which has been cited from the Consolato, art. 105, is applicable. There it is said that a merchant, being on board a ship with his goods (which was the custom, according to the simplicity of ancient commerce), having money, was obliged to advance it for the necessities of the voyage; and if he had not money, the master might sell a part of his lading. The Ordinance of Antwerp, likewise, seems expressly to recognize it; and the passage of Bynkers-

hook, which has been cited, seems to me capable of no other interpretation. The passage is very general in its terms, and is by no means limited to the peculiar case in which the owner of the ship is likewise owner of the cargo. The *dictum* is perfectly unqualified in describing the authority of the character of master.

So far for foreign authorities. Upon the authorities of our own law, it is to be observed, that the power of hypothecation has been but incidentally noticed in the books of the common law, because such bonds are exclusively proceeded upon in the Courts of Admiralty, which can alone give the possession of the *res*, which is the actual security in dispute. It is principally in attempts to obtain prohibition, that the power of hypothecation can be noticed by the common law, and what is only incidentally noticed in the Courts, is of course but slightly and indistinctly noticed by the writers. It is of importance, however, that whenever occasion has called for incidental observations on this contract, it appears to have met with countenance. A *dictum* expressly recognizing such a power appears to have dropped from Lord *Hardwicke* in the case of *Buxton v. Snee*, 1 Ves. 155, where it is spoken of as a power arising out of his authority as master, and the necessity thereof during the voyage, without which both ship and cargo would perish; and as a power which both the maritime law and the law of this country allow. An earlier instance is that in *Justin v. Ballam*, 1 Salk. 34. How that *dictum* arose does not sufficiently appear; there was nothing, I find, on reference to the books of the Court of Admiralty, in the circumstances of the case to lead to it, as it was a case of a suit against the ship only, for a cable and anchor supplied in the Thames by merchants of this town. Whether it was a *dictum* of the Court, or only of counsel, *non constat*, it might have found its way into the argument, and have received incidentally the countenance of the Court, though it is true the report of the same case by Lord *Raymond* makes no mention of it. It is at the very lowest the impression of that reporter, although the reason assigned for it is expressed in too general terms, for the master does not ordinarily represent the owner of the cargo as well as of the ship, but only in cases of accidental necessity, in which the policy of the law throws that character upon him. This *dictum*, wherever it comes from, derives some confirmation from its reception into the Digest of Lord Chief Baron *Comyns*, tit. Admiralty, E. 10, where it is cited amongst the rules of unquestioned authority. I observe that Mr. Viner, tit. Hypothecation A., in citing the case of *Trantor* and

Shippin (which in other books is denominated *Trantor* and *Watson*), represents Mr. Justice *Powel* as expressly extending the master's power of hypothecation to the goods; but from a report of the same case, 6 Mod. 18, he rather appears to have said no more than that "if the master possessed such a power, it would bind the property in the hands of a third party;" on which it is to be remarked, that although this hypothetical form of speaking asserts nothing directly, it pretty strongly implies that that able and learned judge, as I have always understood him to be traditionally reputed, did not feel any of his notions of law or equity offended by the supposition that such a power legally existed. Of *Molloy* I say nothing, knowing well that the authority to which he refers does not sustain him, and that his own authority amounts to little.

These passages are all that I can find affirmatively in the common law writers, but it is no slight negative argument of the understanding of the common law, and no small confirmation of the fitness of this principle, that during a long series of years no instance has happened in which a prohibition to the enforcement of such a contract has issued; and the inference will be the stronger, if it shall appear that numerous suits have actually been entertained in the Courts of Admiralty on such bonds. The mention of numerous suits brings me to the result of a research which I directed to be made in the records of this Court, a Court whose practice on a question of this nature—a question of the general maritime law—is not without its authority. I find from the list that has been returned to me, that there has been, in later times at least, a constant practice of proceeding upon such bonds, as well against the cargo as the ship. How early this practice may have prevailed, or what may be the most ancient instances of it to be found in these records, has not been ascertained; but I find two instances in the year 1750, and from that time downwards, there is a list of twenty-three or twenty-four cases, in which the proceeding has been in some, against the cargo only, in others (and much more generally) against the ship and cargo together. In some of these cases, protests have been entered, almost to the extent of the present protest, denying the power of the master to bind the cargo under the circumstances of those cases; but these protests have been either waived or overruled. In the year 1786, there was the case of the '*Vier Gebroeders*,' in which I was of counsel, and although the decision, as it is said by the King's Advocate, proceeded on other grounds, the fact appeared that the master had exercised this power, and it seemed

to be admitted, tacitly, at least in the argument, that he possessed generally such a power. It is likewise something in addition to the practice of this Court, that such bonds are frequently occurring in the practice of merchants, being notoriously given and taken; and the practice of merchants in such a matter goes a great way to constitute that *lex mercatoria* which all tribunals are bound to respect, wherever that practice does not cross upon any known principle of law, justice, or national policy. Adverting therefore to the fair foundation of the general principle, and to the authority of the maritime law as it has been for some years practised in this Court, and countenanced in all the instances in which it has been brought to the notice of the Courts of common law,—adverting also to the practice of what I may call the *lex mercatoria*, I think I am warranted in pronouncing for the power of the master to bind the cargo for the repairs of the ship, in order to effect the prosecution of the voyage, in such a manner as to entitle the party who advances the money to sue for the enforcement of his bond in the Court of Admiralty. At the same time I think myself bound to observe, that it is perhaps the first instance in which a judgment has been demanded upon this point; and as I cannot but feel with peculiar weight the insufficiency of the opinion of any one individual to decide on such extensive interests as may depend on this question in such a commercial country as this, it becomes me to suggest that it may perhaps be not improper that a resort should be had to the collective wisdom of another jurisdiction.

It remains to consider whether the situation of the master was such as to authorize the exercise of this power, which, I have said, only in the case of a severe necessity may belong to him; and secondly, whether the lender has at all acted unfairly under that necessity, by taking undue advantage, so as to vitiate the contract either in the whole or in part; for it must be proved upon the lender that he has taken such undue advantage. It will not be sufficient, either upon principle or upon determination of the Court, that the master has taken undue advantage against his employer; that is a matter between him and his employer, with which the third person has nothing to do, unless personally implicated by the facts of the transaction in the fraud that may have been practised.

The protest of the master states, “That he sailed from Trieste with his ship in good condition; that he went to Venice, Zante, and Cephalonia, and took in a cargo of fruit for London; that in the course of his voyage to London he met with tempestuous

weather, and sprung a leak, so as to make it necessary to unship and reload; that he proceeded to Gibraltar, but that a gale of wind sprung up and drove him off from that port without a bill of health; that he approached the bar of Lisbon, but was not permitted to enter on account of his not having a bill of health; that he was proceeding on his voyage, when he was again driven back by tempestuous weather into Lisbon, in a state of as complete distress as he could possibly be." What was he to do in this situation? It is admitted that he was not obliged to transship. If at liberty so to do, still he knew that his cargo was insured in that very ship, and that all his policies might be voided upon a transshipment. To have sold the whole or parts of a cargo consisting generally of fruit, in a fruit country, would scarcely be thought advisable. It is said he might have written to the proprietors; but it does not appear that he knew who the proprietors were. Those to whom he was to deliver might be mere consignees. The Court would undoubtedly be very unwilling to relax the general obligation of masters to correspond with the proprietors, where it is practicable; but taking the obligation to be such, the master has complied with that obligation; he applied to the correspondent of the principal consignee, who is described as owner of a part of the cargo. From him he received an answer sent by that consignee and proprietor, Mr. Powell, expressly declining to give particular directions, and referring him entirely to his own discretion. From that conduct, I think that all the authority that might become necessary for the preservation of the cargo was devolved upon him by the very act of the consignee, even if he had not possessed it under the general law. For if he was remitted to his own discretion, everything then which he did under that discretion, justly exercised, was expressly warranted by the act of his employer, so far at least as the interests of that particular employer were concerned. Certain it is, that no such directions, given or withheld by that employer, could at all affect the agency of the master with respect to the other parts of the cargo in which that employer was not concerned. With respect to them, he possesses the authority which the general law gives him, and no more.

In the state of consummate distress in which he arrives at Lisbon, what is this man to do? A great deal of argument has been used to show what he should not have done. I could have wished that a word or two had been employed in showing satisfactorily what he ought to have done, or could have done with more propriety in this

situation. It has been said, there was the ship and freight. He has acted rightly in binding both in this very bond. It has been added that he might have bound himself. This also he has actually done; though I presume the mere personal security of such a man, a hired master of a vessel, would go but a little way to satisfy a foreign lender of money.

It is said that he ought to have bound his owners likewise; but those who propose that, should first prove his authority to bind his owners personally beyond the value of their ship (which value he has already bound), and likewise find merchants at Lisbon who would be willing to advance money upon the personal security of the owners, living at Trieste, whom they might be under the necessity of ultimately following into a personal suit in the supreme court of the empire. Then the ship and freight being pledged, and the master having no other funds, and being anxious to convey the cargo to the place of its destination, what could he do better than hypothecate the cargo, under the reasonable expectation, which this case afforded, that the ship and freight, and average expenses falling particularly on the lading, would have been sufficient to discharge the bond, without calling on the cargo? In pursuing this resolution, it was barely possible for a man to act with more caution than this master appears to have done. He applied to not only the consul of his nation, but likewise to the court of justice in the foreign country. It seems to be the particular regulation of that country, that matters of this nature shall not be transacted without the sanction of a court of justice. As to the policy of that regulation, doubts may be entertained whether it might not be safer to leave matters of that sort to the vigilance and honesty of the parties interested, rather than to the superficial attention which may be given by persons employed to inspect the circumstances of the case by a court of justice. The court at Lisbon however proceeded to examine the truth of the representation given by the master; witnesses were examined; surveys under public authority were made. The result was, that the ship is reported by the surveyors to be of sufficient authority to warrant the repairs. The repairs are made, and the master has the authority of the court not only for the propriety of the repairs, but likewise for the reasonableness of his expectation that the ship alone would be able to answer the expense of them. Still, however, the foreign lender was not obliged to advance money, but on such security as he liked; and in this situation the master pledges the additional security of

the cargo. He proceeds on his voyage to England, and the bond, which became due on the event of his arrival, is put in suit. The consequence is that the ship is sold; and being sold as a foreign ship, unable to procure a register, sells for not more than half the value at which she was estimated at Lisbon.

Upon this state of the case, it is evident that instead of the cargo being sacrificed to the ship, which is the present complaint, the ship has been made the martyr of the cargo. For it is in the service of that cargo that she has been brought to a place where the owners suffer this extreme diminution of her value. In her unrepaid state at Lisbon, she is valued at six millions of rees,¹ and therefore would have sold there in that condition for a much larger sum than she produced, after her repairs, by a sale in England, for a purpose which absorbs the whole of her value, freight included, and a good deal more. She adheres with fidelity to her engagements with the cargo, and is a victim to the execution of that duty.

On the whole, I am of opinion that the situation and the conduct of the master has been such as to justify the exercise of that right which belongs to him in cases of necessity, although interests of the owners of the cargo, whose ordinary agent he is not, may be affected by it, unless it can be shown that the other contracting party, the money-lender, was prevented from contracting by any incompetency which would vitiate the whole of the bond, or has fraudulently charged sums, computing the account for which the bond is given, that would vitiate it *pro tanto*.

With respect to the first, it is true that Mr. Calvert (who advances the money at Lisbon) is the correspondent of one of the consignees of the cargo; and it is argued to be an extraordinary thing, and a proof of collusion on his part that would constitute a total incompetency, that he, the correspondent, should enter into such a contract. (See *The Hero*, 2 Dod. 139 and note.) In the first place, it is to be observed, that Mr. Calvert is the correspondent of one consignee only, and therefore, with respect to the goods of that consignee, I am still to learn that it is the bounden duty of a foreign correspondent to advance his money without authority, and without such security as he may approve; and thirdly, this consignee having declined to give any orders, and having expressly thrown the whole upon the discretion of the master, I think that Mr. Calvert stood, with respect to these goods, on the same footing

¹ About £1600.

as any other merchant; and if the master was driven to the resource of bottomry, nothing in the relation of Mr. Calvert to those goods created an incompetency in Mr. Calvert to advance his money on such security, as any other man might have demanded for it.

There being nothing in the conduct of the parties to invalidate the contract, it remains only to inquire, whether any articles have found their way into these charges (see App. vii. 3 C. Rob. p. 33) that ought not to have appeared there. It does not appear that many articles are questionable. I perceive that there is a pretty heavy commission charged. I know that the word commission sounds sweet in a merchant's ear, but whether it is a proper charge or not on this occasion, I will not take upon myself to determine without reference to the Registrar, properly assisted. The master being in a situation of distress, was left to act for the best conveyance of his cargo; and I think he may be fairly supposed to have done so. The bondholder advances the money, having a right to elect his security, and he has run his risk on that security.

If the ship and cargo had perished, he would have lost the whole. The owners of the ship have lost all, and there is a great loss besides. On whom is this loss to fall? It can fall only on the proprietors of the cargo, or on the bondholder who has advanced his money and run his risk upon the given security, and under circumstances which by no means affect him with incompetency to enter into such a contract,—a contract from which the cargo has received a considerable benefit. I think that there is no question of the liability of the cargo.

As to some particular goods, for which a further distinction has been taken, on the ground that they are privileged goods, not paying freight, I think that distinction insufficient. They have had in an equal degree the benefit of their conveyance to the place of their destination, and it is not reasonable that they should be exempted from the obligation attaching on the whole of the cargo, of being amenable for contribution to the bond, although the owner of the vessel might, as far as his interests alone were concerned, have been willing to show them a particular indulgence. If they are the goods of the owner of the ship, they can have no more right to be exempted from contributing than the ship itself.

Bond enforced against the cargo.

In the principal case, generally referred to as "the celebrated case of the 'Gratitude,'" Sir *William Scott* (afterwards Lord *Stowell*), in his well-reasoned judgment, shows conclusively that the master of a ship has power, in proper cases, not only to hypothecate, by means of a bottomry bond, the ship and freight, but also the cargo committed to his care, as, for instance, for the repairs of the ship. The rule of law which gives this power to the master, both in the case of the hypothecation of the ship and freight, and of the cargo, is founded upon the prospect of benefit to the proprietor. "It is true," observes the learned judge, "that if the repairs of the ship produce no benefit or prospect of benefit to the cargo, the master cannot bind the cargo for such repairs; but it appears to me that the fallacy of the argument that the master cannot bind the cargo for the repairs of the ship, lies in supposing that whatever is done for the repairs of the ship is in no degree, and under no circumstances, done for the benefit, or with a prospect of a benefit, to the cargo: whereas the fact is, that though the prospect of benefit may be more direct and more immediate to the ship, it may still be for the preservation and conveyance of the cargo, and is justly considered as done for the common benefit of both ship and cargo." *Ante*, p. 41. See also *The Jacob*, 4 C. Rob. Adm. Rep. 245; *The Osmanli*, 3 Wm. Rob. Adm. Rep. 214.

The power of the master to bind

the cargo depends upon the *necessity* of the case; and indeed, as we shall hereafter more fully show, he has no right to hypothecate the ship, freight, or cargo, except in cases of necessity, where funds are wanted for the purpose of enabling the ship to proceed on her voyage, and deliver her cargo to the owners or consignees.

It is proposed in this note, after some preliminary observations relating to bottomry bonds, to show what are the circumstances under which the master has power to bind the ship, freight, and cargo thereby; when he can sell part of the cargo for the repairs of the ship, or sell the ship and the whole of the cargo; and lastly, under what circumstances the master should transship the cargo.

By a bottomry agreement, whether it be in the shape of a bottomry bond or bottomry bill, either the owner of a ship, or a person acting for him as the master, may, in consideration of money advanced for the use of the ship, bind the ship, freight, and cargo for the repayment of the sum advanced and interest, if the ship terminates her voyage successfully.

These instruments are called bottomry bonds or bills, because the keel or bottom of the ship, *pars pro toto*, is pledged as a security for the repayment of the sum advanced. *The Atlas*, 2 Hagg. Adm. Rep. 53.

By statute 19 Geo. II. c. 37, money lent on bottomry or *respondentia* on vessels belonging to his Majesty's subjects, bound to or

from the East Indies, must be lent only upon the ship or merchandize, with benefit of salvage to the lender; a previous statute, 7 Geo. I. c. 21, having made void all contracts by his Majesty's subjects on the loan of money, by way of bottomry, on any ship in *the service of foreigners*, bound to the East Indies. See Smith's Merc. Law, 402, 5th ed.

A bottomry bond, being a chose in action, is not assignable at law (*Marshall v. Wilson*, Abb. Ship. 125, 9th Ed.), but in the Court of Admiralty it is considered a negotiable interest, which may be transferred and sued upon by the person so acquiring it. *The Rebecca*, 5 C. Rob. Adm. Rep. 104.

A bottomry contract differs in some important respects from ordinary loans: in the first place, because a risk must necessarily be run by the holder; and in the next place, because (even before the abolition of the usury laws) any rate of interest might be charged.

As to the Risk to be run by the Lender on a Bottomry Bond.—That it is essential to the validity of a bottomry bond that a *sea-risk* should be incurred by the lender, and that the pledge on the ship should take effect only in the event of its safe arrival, is laid down in the recent case of *Stainbank v. Shepard*, 13 C. B. 418. There a vessel having put into a foreign port in a damaged state, the master borrowed money of a merchant there for necessary repairs and disbursements; to se-

cure which he drew bills of exchange upon his owner, and also executed an instrument which purported to be an hypothecation of the ship, cargo, and freight. By this instrument the merchant who advanced the money forbore all interest beyond the amount necessary to insure the ship to cover the advances; and the *master took upon himself and his owner the risk of the voyage, making the money payable at all events*, and subjecting the ship to seizure and sale by virtue of process "out of her Majesty's High Court of Admiralty of England, or any Court of Vice-Admiralty possessing jurisdiction at the port at which the said vessel might at any time happen to be lying, or to be, according to the maritime law and custom of England," in the event of the bills being refused acceptance or being dishonoured. It was held by the Exchequer Chamber, affirming the decision of the Court of Common Pleas, that this was not such an hypothecation as could be enforced in the Court of Admiralty, inasmuch as the payment of the money borrowed was not made to depend upon the arrival of the vessel. See also *The Nelson*, 1 Hagg. Adm. Rep. 169; *The Atlas*, 2 Hagg. Adm. Rep. 53; *The Emancipation*, 1 Wm. Rob. Adm. Rep. 130; *The Royal Arch*, 6 W. R. 191 (Adm. C.).

It is not however necessary that the person advancing his money upon a bottomry bond should take upon himself the peril of the voyage, expressly and in terms, though

this is often done; for it is sufficient that the fact can be collected from the language of the instrument, considered in all its parts; for it has been said that such instruments as bottomry bonds, being drawn up in the language of commercial men, and not of lawyers, should receive a liberal construction to give effect to the intention of the parties. *Simonds v. Hodgson*, 3 B. & Ad. 50, 57; 6 Bing. 114; *The Nelson*, 1 Hagg. Adm. Rep. 169; *The Emancipation*, 1 Wm. Rob. Adm. Rep. 130; *The Vibilia*, ib. 5; *The Kennerley Castle*, 3 Hagg. Adm. Rep. 7; *The Alexander*, 1 Dods. Adm. Rep. 280.

It seems that a bottomry bond is not invalid, because the bondholder, although he takes an extraordinary and maritime, but not extravagant rate of interest, takes upon himself the risk of the outward voyage only. *The Hero*, 2 Dods. Adm. Rep. 142.

As to the Amount of Interest.—

As the title to repayment of the sum advanced is not certain, but eventual, dependent upon the safe accomplishment of the intended voyage, the lender has always been entitled to demand a much higher rate than the current interest of money in ordinary transactions. It partakes of the nature of a wager, and therefore is not limited to the ordinary interest; the danger lies, not upon the borrower, as in ordinary cases, but upon the lender, who is therefore entitled to charge his *pretium periculi*,—his valuation of the danger to which

he is exposed. *The Atlas*, 2 Hagg. Adm. Rep. 57. A contract similar to this, upon the cargo of the ship, is called *respondentia*, but it was of rarer occurrence (ib. 58), and indeed since the passing of 19 Geo. II. c. 37, it has been disused in this country. *The Cognac*, 2 Hagg. Adm. Rep. 386.

But although the high rate of interest at which money may be lent upon bottomry will not affect the validity of the bond, it will be a proper subject for reference to the registrar and merchants, and if it be found to be excessive or fraudulent, the Admiralty Court will reduce it; but the Court will only exercise this authority on clear and undisputable cause shown, and with great caution. *The Zodiac*, 1 Hagg. Adm. Rep. 326; *The Cognac*, 2 Hagg. Adm. Rep. 386; *The Heart of Oak*, 1 Wm. Rob. Adm. Rep. 215; 1 Notes of Cases, 214; *La Isabel*, 1 Dods. Adm. Rep. 277; *The Alexander*, ib. 279; *The Lord Cochrane*, 8 Jur. 716; 3 Notes of Cases, 172; *The Albion*, 1 Hagg. Adm. Rep. 333. And see *The Nelson*, 1 Hagg. Adm. Rep. 169, as to bills of exchange given as collateral securities to a bottomry bond being drawn at too high a rate of exchange.

It does not appear to be absolutely necessary that a bottomry bond should carry maritime interest, and a party may consequently be content with ordinary interest; but when the character of an instrument is to be collected from its contents, and where the argument in support of the bond is, that the

advance of the money was attended with risk, it is a material circumstance that only an ordinary rate of interest has been demanded. *The Emancipation*, 1 Wm. Rob. Adm. Rep. 130.

Who may give a Bottomry Bond.—A bottomry bond may be executed, either by the owner of the ship, even without the concurrence of the master (*Duke of Bedford*, 2 Hagg. Adm. Rep. 294), or by the master, with the express authority of the owner (*The Bonaparte*, 3 Wm. Rob. Adm. Rep. 298), or in proper cases (that is to say, as we shall hereafter more fully see, in cases of necessity) by the implied authority of the owner. This implied power may be exercised by the ostensible and acting master (*The Jane*, 1 Dods. Adm. Rep. 464), although he be not the registered master (*The Orelia*, 3 Hagg. Adm. Rep. 81), or may have been appointed not by the owner, but by his agent (*The Kennersley Castle*, 3 Hagg. Adm. Rep. 1), a consignee of the cargo (*The Alexander*, 1 Dods. 278; *The Rubicon*, 3 Hagg. 9), or by the British consul in a foreign port (*The Zodiac*, 1 Hagg. 320). In a case of necessity a bond given by the consul himself was supported. *The Cynthia*, 16 Jur. 748.

The Court of Admiralty has, it seems, no jurisdiction when a bottomry bond has been executed by the owner in this country before the beginning of the voyage. *The Royal Arch*, 6 W. R. 191 (Adm. C.).

When, however, the vessel is in a foreign country, although it may happen to be that in which the owners reside, they may by their consent authorize the master to give a bottomry bond, which the Admiralty Court of this country will in a proper case enforce against the ship. *The Bonaparte*, 3 Wm. Rob. 298.

But it seems that, under ordinary circumstances, it is not competent to the master, even with the consent of the owner, to grant a valid bottomry bond upon a British ship lying in a British port for a new voyage, such bond to be suable in the Court of Admiralty. *The Royal Arch*, 6 W. R. 190, 193. The reasons for this appear to be: first, because such a bond would create, if valid, what may be termed a secret lien on the ship, without what the law could consider necessity, and the consequence would be that subsequent *bond fide* mortgagees might be injuriously affected; and secondly, in early times such bonds would or might have been used to cover usurious transactions, though fortunately all such useless restrictions as the usury laws are now removed.

What justifies the Master in giving a Bottomry Bond.—In consequence of the high rate of interest usually demanded when money is raised by way of bottomry, it should not, as a general rule, be resorted to except in cases of necessity. When the owner gives his express consent, the question

as to whether it was necessary to resort to that mode of raising money will of course not arise, at any rate, as to the ship and freight, as it is for his protection that the rule has been laid down.

In the absence of the express consent of the owner the master must, in all cases where he can, in the first instance, if he has not funds in hand, endeavour to obtain them either on his own responsibility, or on the personal credit of the owner. See *Gore v. Gardiner*, 3 Moo. P. C. C. 79; *Wallace v. Fielden*, 7 Moo. P. C. C. 398, 409; *The Gauntlet*, 3 Wm. Rob. 92; *Stainbank v. Fenning*, 11 C. B. 88, per *Jervis*, C. J.

Hence he must, in the first place, endeavour to communicate with the owner of the ship, so as to enable him to raise the funds wanted on his own personal security; or, if he have not the means of raising them, to give him an express authority to resort to hypothecation.

This often gives rise to the question whether the master was able to communicate with the owner within such a period as the necessities of the ship required, for the rule now is that whether the ship be in a foreign port, or in a port of the same country as the owner is residing in, if the master can communicate with the owner within a time commensurate with the necessities of the ship, and he neglect to do so, any bottomry bond which he may give for raising money will be void; on the other hand, if he be unable to

communicate with the owner within a time commensurate with the necessities of the ship, even if the owner were in the same country, the bond would be valid.

The law upon this subject was much discussed in the recent case of *Wallace v. Fielden*, 7 Moo. P. C. C. 398. There a bottomry bond was granted in New York by the master to obtain money for necessary repairs of a ship, the owner whereof was residing at St. John's, New Brunswick. A communication by electric telegraph existed between the two cities. The bondholder had previously acted as the general agent of the owner, and no intimation of the transaction was made by the master to the owner until after the execution of the bond. It was held by the judicial committee of the Privy Council reversing the decision of the Admiralty Court—(see *The Oriental*, 3 Wm. Rob. Adm. Rep. 243), that the master, having the means of communication with the owner, no such absolute necessity existed as to authorize him to pledge the ship without communication with the owner, and the bond was consequently declared void. "Formerly," said Sir *J. Jervis*, C. J., in delivering judgment, "the rule of law was this, that whenever the owner of the ship and the master, at the time of the advance, were in ports foreign to each other, then there would, of necessity almost, be such a want of opportunity of communication as to clothe the master with authority to raise money on bottomry, and

the converse was supposed to hold, namely, that whenever the vessel and the owner were in the same country, on the other hand, the opportunity of communication did exist, so that the master would not have authority to raise money on bottomry. The authority to borrow on the credit of the owner and on bottomry is the same, only, in the second case, there is this ingredient, the money cannot be raised without the pledge of the ship.

"Now the rule of law was broken in upon by the judgment of Lord *Stowell*, in the case of *La Ysabel* (1 Dods. Adm. Rep. 273), for, in that case, the ship and the owner were in the *same* country, but not in a country where there was the ability of communication; because, as Lord *Stowell* said, there was a disturbance at the time, and it was as impossible to communicate with the owner in Spain, though the ship was in Spain, as if she was in a foreign country, treating it, not as a matter of law, *but a test of the possibility of the power to communicate*. Therefore in the absence of the power to communicate, the agency held. Following that up, the converse has been held. In England, though the owner is in England, and the vessel too, yet, if the power of communication is not correspondent with the necessity, the authority to borrow money exists. According to *Arthur v. Barton* (6 M. & W. 138), *Johns v. Simons* (2 Q. B. 425), and *Stonehouse v. Gent* (2 Q. B. 431, note), if there be no power of communi-

cation with the owner correspondent with the necessity, the power to raise the money exists. If there was a great emergency, and the master could not raise the money on the credit of the owner, he must then raise it on the ship by bottomry, whether she is in one country or another, taking it for granted there was an absolute necessity, and that there was no power of communication. Now if this be the real principle, and if this be the proper distinction, what is the rule of law applicable to a foreign country? You have authority, but that is only because you have no means of communication. We must, however, look at the circumstances of this case. There was not only the power of communication, but an absolute communication made. It was made, and properly made, at the moment of the accident, communicated and received within a few hours, and by a means of communication in existence which must be taken to be the proper mode or channel of communication, not to send money as suggested, but to send a communication on the one hand, and receive an answer on the other. Why, here being the means of communication, and the authority of the master being founded on the impossibility of a communication, their lordships are of opinion that there was no authority in the master to raise money on bottomry; therefore he was not clothed with a right which could confer that property on the person who took the bond." See

also *The Trident*, 1 Wm. Rob. Adm. Rep. 29. The opinion therefore expressed by Lord Cottenham, C., in *Glascott v. Lang* (2 Ph. 321), where he differed from that of Sir J. L. Knight Bruce, V.C., seems to be wrong.

A master may, in a case of necessity, grant a bond of bottomry on the ship *and cargo* in a foreign country, where the ship-owners reside, and with their consent, *although he may not have previously communicated with the owners of the cargo*. See *The Bonaparte*, 3 Wm. Rob. Adm. Rep. 298. There a Swedish vessel, being much damaged, the master put into Stromstad, and immediately went over to Uddevallah, a distance of about sixty miles, where the owners resided, who, not being able to furnish him with the necessary funds for enabling him to prosecute his voyage to England, told him that he must get the repairs effected at Stromstad, and there borrow the requisite sum on bottomry of the vessel, her cargo, and freight. The master accordingly, being unprovided with funds, and being unable to raise them on his own personal credit or on that of the owners, granted a bottomry bond on the ship, freight, and cargo, for the necessary advances, *without any communication with the owners of the cargo resident at Hull*, in this country. It was held by the Court of Admiralty that the bond was valid, as against the owners of the cargo. "The question," said Dr. Lushington, "is whether the

bond is invalid by the general maritime law as regards the cargo, by reason of such bond having been granted in the country of the owners of the ship, and with their sanction, but without any notice having been given to the owners of the cargo. Now I am of opinion that the principle, as far as it extends (for it is not a universal rule), that a bond shall not be granted in the country where the owner of the ship resides, is a principle which is directed rather to the protection of the owner of the ship, than the owner of the cargo; and that this principle must in all cases depend upon the facility, or otherwise, of communication with the owner of the ship or cargo. Where the owner was resident abroad, the principle clearly would not apply, especially in this case, where the owner was a consenting party. . . . It appears that information of the necessities of the vessel was conveyed to the shipper of the cargo, and he refused to advance any money at all. Under these circumstances, does the law require that the master, as a matter of necessary obligation upon him, should have made a communication to the owner of the cargo in England? if, indeed, he knew who that owner was. As far as the evidence before me goes, there is nothing either in the bill of lading, or in the other circumstances of the case, which shows that the master knew in whom the property of the cargo was. I know of no authority which renders it imperatively ne-

cessary that such a communication should always be made; and I certainly do not perceive that the circumstances of this case particularly required it. So far as the authorities go, in the case of *The Gratitude*, Lord Stowell said, and said truly, it was exceeding desirable that application should be made to the consignee of the cargo where it is practicable; but in no case whatever to my knowledge, and none has been cited, has it ever been laid down by this Court that there was an absolute necessity of making such communication. It may undoubtedly be expedient to do so for various reasons,—amongst others, to take away all suspicion of fraudulent intention on the part of those concerned in the bottomry transaction.”

Assuming that the master has no other means of procuring funds, and has not been able to communicate with the owners, still the question remains, was there *an absolute necessity* such as justified him in resorting to hypothecation?

The necessity for funds may arise in various ways: such, for instance, as in the principal case, where *repairs* are absolutely necessary, in order to enable the ship to proceed on her voyage for the purpose of delivering the cargo according to her charter-party (*ante*, p. 28); so where the ship may be arrested, and sold in a foreign country, in default of making certain payments. (*Smith v. Gould*, 4 Moo. P. C. C. 21, 25); such as port duties, without providing for which the voyage could

not be prosecuted. *Ib.* 25, 27; and see *The Gauntlet*, 3 Wm. Rob. Adm. Rep. 82. But the master cannot hypothecate the ship for any demand in respect of which he himself only is liable to be arrested in a foreign country. 4 Moo. P. C. C. 28. Thus when a bottomry bond was given by a master upon a threat of arrest, for supplies previously furnished on his personal credit, it was held void. *Gore v. Gardiner*, 3 Moo. P. C. C. 79. Upon the same principle, a bottomry bond cannot be granted for a debt incurred on a former voyage (*The Hero*, 2 Dods. 147), or for debts arising from supplies and necessities furnished to other ships, though belonging to the same owner. *The Osmani*, 3 Wm. Rob. Adm. Rep. 198–212.

Although, on general principles, when work has been done, or advances made upon personal security in the first instance, the party doing the work or making the advances is not at liberty to turn round upon the owners, and cover himself by exacting a bond of bottomry from the master; nevertheless where expenses have been incurred by a vessel when the master was out of possession, and was incompetent to take charge of her, a bond subsequently given by him for such advances has been held valid. See *The Gauntlet*, 3 Wm. Rob. Adm. Rep. 82. There a vessel having been carried into a foreign port by a mutinous crew, with the master dispossessed and in irons: the expenses incurred by a party employed by the British

vice-consul to investigate into the mutiny, and to re-invest the master in his command, was allowed by the Court to be a good foundation for a bottomry transaction, although no mention was made of a bond in the outset of the inquiry, and the bond was taken from the master on the eve of the vessel's sailing from the port.

From the authorities we have considered, it is clear that a party taking a bottomry bond is bound, in the first place, to see whether the money he advances be wanted for the necessities of the ship (*The Roderick Dhu*, 1 Swab. Adm. Rep. 177, 182 183, 184); and in the next place, whether the funds he is about to advance or the supplies which he is requested to furnish for the purposes of the ship, could not have been procured on the personal credit of the owner (*Heathorn v. Darling*, 1 Moo. P. C. C. 5), for if the funds are not necessary, or could have been procured on the personal credit of the owner, the holder of the bond will not be able to recover upon it.

If, however, persons advancing money upon bottomry, do so after having ascertained that it is wanted for the necessities of the ship, they are not bound to see to its application. *The Roderick Dhu*, 1 Swab. Adm. Rep. 182.

The sale of a bottomry bond, pursuant to public advertisement, by auction to the lowest bidder, in a foreign port, is not sufficient to discharge a purchaser from making reasonable inquiries whether the master is, under the circum-

stances, justified in granting the bond. *Soares v. Rahn*, 3 Moo. P. C. C. 1, 10.

A bottomry bond may be good in part, though void for the residue. Thus, in *Smith v. Gould*, 4 Moo. P. C. C. 21, where a bottomry bond was given by the master at New York, as well for advances to obtain his discharge from arrest at the instance of the consignees, on account of damage done on the voyage to part of the cargo, as for payment of the port duties and other disbursements necessary to enable the ship to prosecute her voyage; the Judicial Committee of the Privy Council, reversing so much of the decision of the Admiralty Court as rejected the bond *in toto*, sustained the bond to the extent of sums advanced for necessary supplies and payment of the port duties. See also *The Osmanli*, 3 Wm. Rob. Adm. Rep. 198, 218.

It seems, however, that it by no means follows in all cases where a small amount of the sum claimed is properly a subject of bottomry, and the larger proportion of the demand is not properly the subject of a bond, that the Court would consider itself to be under the necessity of pronouncing for that smaller amount, as such a practice might lead to fraud, inconvenience, and litigation. *The Osmanli*, 3 Wm. Rob. 219.

Where a British vessel has completed a voyage to a foreign port, she can in a case of necessity be bottomried by the master, to cover the expenses of repair and outfit for a new voyage, in the same way

as she could be for the voyage home, and such bond can be sued upon in the Admiralty Court. *The Royal Arch*, 6 W. R. 191, 194 (Adm. C.).

Although, as we have before seen, it is essential to the validity of a bottomry bond, that the sum advanced should only be repaid in the event of the ship reaching her port in safety; nevertheless, if the ship be lost after having deviated from the voyage stipulated for in the bottomry bond, the bondholder will be entitled to recover (*Western v. Wildy*, Skin. 152; *Williams v. Steadman*, ib. 345; *Vachel v. Vachel*, 2 Ch. Ca. 130; *Anon.* 4 Vin. Ab. 280 pl., 4; 2 Salk. 444), unless the deviation were justifiable. *The Armadillo*, 1 Wm. Rob. Adm. Rep. 256.

Where once the transaction is proved to have been clearly and indisputably of a bottomry character, that is, where the distress is admitted or established, the want of personal credit beyond question, and the bond in all essentials apparently correct; then, and under such circumstances, the strong presumption of law is in favour of its validity, and it will not be impugned save when there is clear and conclusive evidence of fraud, or where it is proved beyond all doubt, that, though purporting in form to be a bottomry transaction, the money was in truth advanced upon different considerations. *The Vibilia*, 1 Wm. Rob. Adm. Rep. 5. See also *The Rhodamante*, 1 Dods. Adm. Rep. 208; *The Alexander, Tate*, ib. 278; *The*

Augusta, ib. 287; *The Hero*, 2 Dods. 142; *The Reliance*, 3 Hagg. Adm. Rep. 74; *The Calypso*, ib. 163, 165; *The Kennersley Castle*, ib. 7; *The St. Catherine*, ib. 254. Thus where small items were pointed out to the Court as having been expended before there was evidence of any negotiation for a bottomry bond, it was held that those items might be fairly included in the sum to be secured, and that it might be presumed they were advanced in contemplation of such a security. *Smith v. Gould*, 4 Moo. P. C. C. 21, 28.

A bottomry bond may be given by a master to the consignees of the cargo (*The Alexander*, 1 Dods. Adm. Rep. 278; *The Rubicon*, 3 Hagg. Adm. Rep. 9), or to an agent of the owner, and more especially if it be so given with the sanction of the owner. *The Royal Arch*, 6 W. R. 191, 194; *The Osmanli*, 3 Wm. Rob. Adm. Rep. 198, 217.

It seems to be clear that the master has no power to authorize the actual transfer of property by way of mortgage, as distinguished from hypothecation, which gives only a right, to be enforced against the subject of it through the medium of process. *Stainbank v. Stainbank*, 13 C. B. 441.

Proceedings with regard to Bottomry Bonds and herein as to the Priorities of Parties claiming to have charges on the Ship.—Proceedings by the holder of a bottomry bond are generally taken in the Admiralty Court, and in deter-

mining upon its validity, the Court will be guided by the general maritime law, and not by the municipal law of the country where it is granted, so far at least as any question arises upon the obligatory effect of the bond on persons not being the subjects of the country where the bond was granted. *The Bonaparte*, 3 Wm. Rob. Adm. Rep. 298, 306.

The proceedings on a bottomry bond in the Admiralty Court are *in rem.* against the ship, freight, or cargo, and not against the owner (see *The Rhadamanthe*, 1 Dods. Adm. Rep. 203; *The Lord Cochrane*, 1 W. Rob. Adm. Rep. 312; *The Trident*, *ib.* 35), and the jurisdiction of the Court exists even where there has only been an agreement for a bond entered into (*The Aline*, 1 Wm. Rob. Adm. Rep. 122); and in cases of bottomry the Admiralty Court may decide all questions as to the title or ownership of the ship, or as to her proceeds (3 & 4 Vict. c. 65. s. 4).

Where in a suit in the Admiralty Court upon a bottomry bond, money due for freight has in consequence of a monition been paid into Court, an action for freight cannot be maintained, as the Court of Admiralty has jurisdiction to decide all questions as to freight in such a case. *Place v. Pott*, 8 Exch. 705; 10 Exch. 370. See also *The Douthorpe*, 2 Wm. Rob. Adm. Rep. 73. And when a vessel has been arrested in a cause of bottomry, she cannot be taken out of the custody of the Admiralty Court by the sheriff under a writ of *fi.*

fa. (*Ladbroke v. Crickett*, 2 T. R. 649), nor can any distress be levied on her for seamen's wages. *The Westmoreland*, 2 W. R. Adm. Rep. 394.

The Court of Chancery has also jurisdiction to give relief upon bottomry bonds; and it will interfere by injunction to restrain proceedings in the Court of Admiralty, either in cases of fraud, or where there are equities between the parties, or where the matter can be more conveniently, directly, and effectually dealt with by the Court of Chancery. See *Duncan v. M'Calmont*, 3 Beav. 409; *Glascott v. Lang*, 8 Sim. 358; 3 My. & Cr. 451; 2 Ph. 310; *Dobson v. Lyall*, 3 My. & Cr. 453 n.; 2 Ph. 323 n.

As to Priorities of Bottomry Bonds.—As a general rule, a bottomry bondholder is entitled to priority over all other creditors (*The Orelia, Hudson*, 3 Hagg. Adm. Rep. 83; *The Madonna D'Idra*, 1 Dods. Adm. Rep. 40; *The Sydney Cove*, 2 *ib.* 13), even over a mortgagee, for when money is advanced on mortgage of a ship, the mortgagee must always be aware that he takes his security subject to all legal liens, and that if he suffers therefrom, his remedy must be against the owners. *The Royal Arch*, 6 W. R. 191, 195. As an exception to the rule, wages take priority over bottomry bonds (*The Hersey*, 3 Hagg. Adm. Rep. 408; *The Constancia*, 10 Jur. 854), unless it seems they were earned before the bond was taken. *The*

Mary Ann, 9 Jur. 95; *The Janet Wilson*, 6 W. R. 329 (Adm. C.).

It has been held moreover that a successful suitor in a cause of damage for collision has a lien on the property condemned paramount to the claim of a mortgagee or bondholder prior to the period when the damage was done, and that the lien also extends in case of a deficiency of proceeds to subsequent accretions in the value of the ship arising from repairs effected at the expense of the owner. *The Aline*, 1 W. Rob. Adm. Rep. 111. Where however money has been advanced and repairs effected by a stranger, and a bottomry bond has been *bond fide* given for the amount of such repairs, the subsequent bondholder will, it seems, have a lien upon the proceeds to the extent of the increased value of the vessel arising from the repairs. *Ib.*

Where there are two creditors, one with a double, and the other with a single security, the Admiralty Court will compel the former to resort to the security upon which the latter has no claim. Thus, if there be a bottomry bond *on the ship only*, and the ship being afterwards arrested for wages, is insufficient in value to meet both claims, if the bond be held not to extend by implication of law to the freight, payment of the wages will be decreed therefrom, leaving the whole proceeds of the ship available in satisfaction of claim of the bondholder. *The Mary Ann*, 9 Jur. 95. The Court of Admiralty in such cases proceeds upon the same

principle as the Courts of Equity do, in what they term the doctrine of marshalling.

With regard to the priority of the holders of bottomry bonds *inter se*, it may be laid down as a general rule that a bottomry bond of later date is entitled to priority of payment over one of an earlier date, because in this species of security which is entered into under the pressure of necessity, the property would, without the subsidiary aid of the later bond, be totally lost, both to the owners and the former bondholders. *The Rhadamanthe*, 1 Dods. Adm. Rep. 204; *The Betsey*, 1 Dods. Adm. Rep. 289; *The Sydney Cove*, 2 ib. 1; *The Eliza*, 3 Hagg. Adm. Rep. 89. Where however different bondholders, acting in privacy and concert with each other, had advanced money upon the same general invitation for the same repairs in which all were equally interested, and on the same terms, and it was intended that the bonds were to have borne the same date, one of the bondholders was not allowed priority merely because his bond was of an earlier date, but all of them were paid *pro rata*, and without any preference. *The Exeter*, 1 C. Rob. Adm. Rep. 173.

A voluntary agreement of the holder of a bottomry bond to postpone payment under it, substitutes a personal for the original contract, and is one over which the Court of Admiralty has no jurisdiction. *The Royal Arch*, 6 W. R. 191 (Adm. C.).

Where advances *on account of*

freight have been *bond fide* made under a covenant in a charter-party anterior to the time when a bottomry bond is given in which freight is included, the bond will not attach upon the freight so advanced. *The John*, 3 Wm. Rob. Adm. Rep. 170.

Rights of the Owner of the Cargo which has been hypothecated for the Repairs of the Ship.—It must always be remembered that the ship is the primary, the cargo only the secondary, fund, for the payment of a bottomry bond. Where therefore a bottomry bond attaches upon a cargo, the cargo cannot be made subject to the payment of the bond until the proceeds of the ship and freight have been exhausted. *The Bonaparte*, 3 Wm. Rob. Adm. Rep. 302.

Moreover as the master who hypothecates the cargo for the repairs of the ship acts exclusively as agent for the shipowner, although as regards the person advancing the money, he can bind the cargo, he cannot bind the owner of the cargo as regards the owner of the ship. The owner therefore of the cargo can recover from the owner of the ship for the loss incurred in consequence even of a necessary and justifiable hypothecation of the cargo. Thus in *Benson v. Duncan*, 3 Exch. 644, the master of the ship 'Lord Cochrane,' damaged by perils of the sea, hypothecated at a foreign port (Pernambuco), by one bottomry bond, for necessary repairs, the ship, freight, and cargo, amongst which were the plaintiff's goods.

The ship and freight realized less than the sum borrowed, and the plaintiff was obliged to contribute towards the difference, and also to pay his proportion of the costs of a suit instituted in the Court of Admiralty by the obligee of the bond. It was held by the Court of Exchequer Chamber, affirming the decision of the Court of Exchequer (reported 1 Exch. 537, nom. *Duncan v. Benson*), that the plaintiff might maintain an action against the owner of the ship, on an implied promise to indemnify. "The celebrated case of the 'Gratitude,'" said *Patteson*, J., in delivering the judgment of the Court, "was relied on to establish this proposition, that, in hypothecating the cargo, the master acts as a sort of supercargo for the benefit of the owner of the cargo, and that, in hypothecating both the ship and the cargo by one instrument, he cannot bind the owner of the ship beyond the value of the ship, and must be considered, as to any sums beyond the value, as the mere agent of the owner of the cargo. That case was explained, as we think most satisfactorily, by the judgment of the Court of Exchequer upon the demurrer to the sixth plea to the first count in this case (1 Exch. 537), and we agree entirely in that judgment. The case of the 'Gratitude' dealt only with the authority of the master in respect of binding the cargo to the lender of the money; it determined nothing as to the relative rights of the owners of the ship and cargo *inter*

se, and any expressions there used by Lord *Stowell*, which might at first sight appear to have such a meaning, will be found on examination to be illustrative only, and not even professing to decide on any such relative rights.

"In ordering the repairs of the ship, the master acts exclusively as agent of the owner of the ship. No other person but the owner of the ship, or his agent, can have any authority to order the repairs. The owner of the cargo cannot insist on such repairs being made, for the shipowner is absolved from his contract to carry, if prevented by the perils of the seas, and he is bound by it if prevented by inherent defects in the ship; in either case, if he does repair, he does so for the sake of earning freight, which the master is bound to enable him to do if he can. Being, then, the agent of the shipowner in ordering the repairs, how can he be the agent of any one else in borrowing money to pay for those repairs? If, in order to borrow that money, he is obliged to pledge, not only the ship, but the cargo, he in effect borrows money on the cargo for the benefit of the shipowner, just as much as he would have done had he sold a part of the cargo to raise the necessary funds, in which case it is not doubted that the shipowner must have indemnified the owner of the cargo. Certainly the master could not, by any bottomry bond, pledge the shipowner to the lender of the money beyond the value of the ship. By such a

bond he gives a remedy *in rem* only, and not a personal remedy against the shipowner. But that circumstance in no way affects the rights of the owner of the cargo as against the shipowner." See also *Benson v. Chapman*, 6 M. & G. 792; 5 C. B. 330; 8 C. B. 950.

It is laid down in the principal case, that if it were to happen that the ship and freight (usually the first things hypothecated) were omitted in the literal terms of a bottomry bond, they would still be liable in contribution to the extent of their value, although the cargo alone had been made immediately answerable to the foreign lender, who has nothing to do with averages of any kind. *Ante*, p. 43.

Power of the Master to sell Part of the Cargo for the Repairs of the Ship.—In the principal case it was admitted, on all hands, that the master had power to sell *part* of the cargo, for the purpose of applying the proceeds to the prosecution of the voyage, by the repair of the ship; and whatever doubt there may have been at that time as to the power to hypothecate the *whole* of the cargo, there appeared to be none as to the power of the master in a proper case to sell a *part* of the cargo.

This in effect is, through the medium of a sale of the goods, to borrow from the shipper or owner of the goods (*Duncan v. Benson*, 1 Exch. 555; *Richardson v. Nourse*, 3 B. & Ald. 237), who may, at his option, claim to be repaid by the

shipowner, either the price of the goods at the place of sale (*Richardson v. Nourse*, 3 B. & Ald. 237), or at the port of destination (*Campbell v. Thompson*, 1 Stark. 490; *Hallett v. Wigram*, 9 C. B. 580); but it has been decided that where the master has sold part of the goods at an intermediate port, if the vessel *does not arrive* at her port of destination, the shipper is not entitled to receive the sum for which the goods would have sold at that port (*Atkinson v. Stephens*, 7 Exch. 567), and although the point does not appear to have been decided by our Courts (see 7 Exch. 578), it seems to be the better opinion that he could not, in such a case, recover from the shipowner the sum of money for which the goods actually sold. Abbott on Shipping, 308, 3rd ed.

The reason why the master can sell only a *part* of the cargo for the repairs of the ship, while, as we have before seen, he can hypothecate the *whole* for that purpose, is well laid down in the principal case, where it is said that the master cannot sell the whole of the cargo, "because it never can be for the benefit of the cargo, that the *whole* should be sold, to repair a ship which is to proceed empty to the place of her destination." On the other hand, hypothecation may be of *the whole*, because it may be for the benefit of the whole, that the whole should be conveyed to its proper market; the presumption being that this hypothecation of the whole, if it affects the cargo at all, will finally operate

to the *sale of a part*, and this in the best market, at the place of its destination, and in the hands of its proper consignees." *Ante*, p. 43.

As to the cases where the owner of the cargo can proceed against the owner of the ship for the value of the cargo sold, and when he must himself contribute to its payment, under the head of general average, see *Birkley v. Presgrave*, *post*, p. 74, and note.

When the Master has power to sell the Ship or the whole of the Cargo.—When the termination of the voyage becomes hopeless, and no prospect remains of bringing the vessel home, the master has power to do the best for all concerned, and therefore to dispose of her for their benefit. *Hunter v. Parker*, 7 Mees. & W. 342. Thus if a vessel has become a complete wreck (*Cambridge v. Anderton*, 2 B. & Cr. 691; *Ireland v. Thomson*, 4 C. B. 149); or if, although her timbers still hold together, she is in such a position that she cannot be repaired except at an expense greater than her value (*Robertson v. Clarke*, 1 Bing. 445; *Mount v. Harrison*, 4 Bing. 388; *Hunter v. Parker*, 7 Mees. & W. 342; *Cambridge v. Anderton*, 4 Dowl. & Ry. 203; 1 Car. & Payne, 213; Ry. & Mood. 60; 2 B. & C. 691; *sed vide Knight v. Faith*, 15 Q. B. 649); or if the vessel is cast away on a foreign coast, where there is no correspondent of the owners, and no money to be had on hypothecation to put her in repair,

so that she might rot before the master could hear from his owners (*Fanny and Elmira*, Edw. Adm. Rep. 117; and see *Read v. Bonham*, 3 Brod. & Bing. 147): in these and such like cases the master will be justified in resorting to a sale. See also *The Glasgow*, 1 Swab. Adm. Rep. 145.

"This principle, however, may be clearly laid down,—that a sale can only be permitted in case of *urgent necessity*, that it must be *bond fide* for the benefit of all concerned, and must be strictly watched." Per Lord Gifford, C. J., in *Robertson v. Clarke*, 1 Bing. 450.

Thus, before a sale can be held justifiable, it must be shown that the master attempted to rescue the vessel by all the means in his power; that if she was capable of being repaired, he had failed in getting money for that purpose. *Gardner v. Salvador*, 1 Mood. & Rob. 118; *The Fanny and Elmira*, Edw. Adm. Rep. 117. The mere difficulty in procuring funds (*Somes v. Sugrue*, 4 Carr & P. 276) or materials for repairs (*Furneaux v. Bradley*, Park on Ins. 365, 8th ed.) will not be sufficient to justify a sale. And even though the vessel may have been in imminent danger (*Idle v. Royal Exchange Company*, 3 Brod. & Bing. 151; 8 Taunt. 755; see vide *Hunter v. Parker*, 7 Mees. & W. 342), if the master, without a sufficient examination into the actual state of the vessel, arrived at the conclusion that she ought to be sold (*Hayman v. Molton*, 5 Esp. 65; *Reid v. Darby*, 10 East, 143; *Doyle v.*

Dallas, 1 Mood. & Rob. 48), or unless in selling he acted upon the best and soundest judgment that could be formed under existing circumstances (*Doyle v. Dallas*, 1 Mood. & Rob. 48), the sale will not be justifiable.

When a sale of a ship, by a master, under such circumstances, is questioned by the owner, the burden of the strict proof of its propriety will be thrown upon the purchaser, for it is his duty to ascertain the authority under which the master acts, or the circumstances which render a sale imperatively necessary; and from this proof, save when there has been a decree by a competent Court, no formality can release him. *The Glasgow*, 1 Swab. Adm. Rep. 145, 146.

Upon the sale of a ship, in a proper case, the master has authority to receive the proceeds as incident to his authority to sell, and it seems that the authority to receive the proceeds involves an authority to order payment of them *bond fide* to such persons as the master may think fit; a payment under such an order being in effect a payment to the master. *Ireland v. Thomson*, 4 C. B. 149, 169; see *Ridgway v. Roberts*, 4 Hare, 106.

With regard to the power of the master to sell the *cargo*, not for repairs of the ship, but for the benefit of the proprietors of the cargo, it was well observed by Lord Stowell in the principal case, that "though in the ordinary state of things the master is a stranger to

the cargo, beyond the purposes of safe custody and conveyance, yet in cases of instant and unforeseen and unprovided necessity, the character of agent and supercargo is forced upon him, not by the immediate act and appointment of the owner, but by the general policy of the law; unless the law can be supposed to mean that valuable property in his hands is to be left without protection and care. . . . Suppose the case of a ship driven into port with a perishable cargo, where the master could hold no correspondence with the proprietor; suppose the vessel unable to proceed, or to stand in need of repairs to enable her to proceed in time. In such emergencies, the authority of agent is necessarily devolved upon him, unless it could be supposed to be the policy of the law that the cargo should be left to perish without care. He must in such case exercise his judgment, whether it would be better to transship the cargo, if he has the means, or sell it. He is not absolutely bound to transship, he may not have the means of transshipment; but even if he has, he may act for the best in deciding to sell; if he acts unwisely in that decision, still the foreign purchaser will be safe under his acts. If he had not the means of transshipping, he is under an obligation to sell, unless it can be said that he is under an obligation to let it perish." *Ante*, p. 39.

Where a master has erroneously sold the cargo of a ship before arriving at the port of destination, though he may have exercised his

discretion *bonâ fide*, the shipowner will be liable to the owners of the cargo in an action of trover, as well as the master, even where the sale has taken place under circumstances not inconsistent with the general authority conferred upon the master by the owner of the cargo. *Ewbank v. Nutting*, 7 C. B. 797; and see *Tronson v. Dent*, 8 Moore, P. C. C. 419.

If the master sells the cargo at an intermediate port, no freight will be due. Thus in *Vlierboom v. Chapman*, 13 Mees. & W. 230, it appeared in a special case that a cargo of rice shipped at Batavia was, by the bill of lading, to be delivered at Rotterdam to the plaintiff, he paying freight for the same. The vessel, having encountered a hurricane, was compelled to put into the Mauritius, where the rice, having been found to be damaged and in a state of rapid putrefaction, was sold by the master, who acted *bonâ fide*, but without the knowledge either of the shipper or shipowner. It was held by the Court of Exchequer that no freight was due either for the whole voyage or *pro ratâ itineris*. "According to the statement made in the special case," said *Parke*, B., "an emergency had arisen, in which, as the law is laid down by Lord *Stowell* in the case of the 'Gratitude,' the authority of agent for the shipper necessarily devolved upon the master, to do the best for his interest, and that was to sell, because the cargo was perishable, and would have perished, if it had been left at the Mauritius, or attempted

to be carried to its place of destination. This sale, therefore, transferred the property and bound the shipper; but in no other respect did the necessity, under the circumstances of the case, confer upon him any agency. But if we suppose that he had a further authority, and that instead of being the master he had been supercargo, and that his sale of the goods had been equivalent to a sale by the defendants themselves, present at the Mauritius, there would have been no reasonable ground to infer a new contract to pay freight *pro ratâ*, for the shipowner was not ready to carry forward to the port of destination in his own or another ship, and consequently no inference could arise that the shippers were willing to dispense with the further carriage, and accept the delivery at the intermediate instead of the destined port. The truth is, that the goods were in the same situation as to the claim for freight as if they had been abandoned by the shipowner and left behind at the Mauritius, and there sold by the owner. This view of the case accords with the decisions in the American Courts to which we were referred. *Armroyd v. Union Insurance Company*; *Hurtin v. Union Insurance Company*; cited in the note, p. 239, to Mr. Justice Story's edition of 'Abbott on Shipping,' in both of which it was held, that if the cargo is sold at an intermediate port for the benefit of all concerned, no freight is due."

As to the Transshipment of a Car-

go.—When the master, in distress in a foreign port, cannot accomplish his contract by the conveyance of the cargo in the same vehicle which he had contracted to furnish, it may become a question whether he ought not to forward it by some other conveyance, or in other words to transship. As is laid down in the principal case, though the master "is empowered to transship, he is not bound to transship." *Ante*, p. 40.

If the master, in the proper exercise of his discretion, transship goods and forward them to their destination by another vessel, he will be entitled to the whole freight he originally contracted for, even though the goods were carried by the vessel into which they were transhipped for less than the freight originally contracted for. See *Shipton v. Thornton*, 9 Ad. & Ell. 314. There the 'James Scott,' a general ship, of which the plaintiff was owner and master, being at Singapore, certain goods were, on behalf of the defendant, their owner, shipped on board of her, under bills of lading, according to which the goods were to be delivered to the defendant at London. The 'James Scott' sailed from Singapore with the goods on board, but having suffered much injury from tempest, she put into Batavia for repair. The plaintiff transhipped the goods on board two vessels, the 'Mountaineer' and 'Sesostris,' by which they were delivered to the plaintiff in London. The freight, both of the goods sent by the 'Sesostris' and

of those sent by the 'Mountaineer,' was less than the freight would have been respectively of the same goods from Singapore to London by the 'James Scott,' according to the original bill of lading. The defendant paid the freight by the 'Sesostris' and 'Mountaineer,' and also the freight to the plaintiff by the 'James Scott' to Singapore, at the rate agreed upon, but refused to make any further payment. It was held by the Court of Queen's Bench that the plaintiff was entitled to be paid by the defendant the sum by which the freight on board the 'James Scott' from Singapore, at the stipulated rate, exceeded that by the 'Mountaineer' and the 'Sesostris.' "It is clear," said Lord Denman, C. J., "that by the contract, the shipowner (and the master as his agent) is bound to carry the goods to their destination, if not prevented from doing so, in his own ship, by some event which he has not occasioned, and over which he has no control. . . . Where however such an event has occurred to interrupt the voyage, as above defined, and the shipowner or master (for we think no distinction can be made between the two) has no opportunity of consulting the freighter, there seems to be much disagreement in foreign ordinances and jurists on the point whether or no he is bound to transship, or whether, having contracted only to carry in his own ship, he is not absolved from further prosecution of the enterprise by the *vis major* which prevents his accomplishing it in

the literal terms of his undertaking . . . All authorities however are in unison to this extent, that the master is at *liberty* to procure another ship to transport the cargo to the place of destination.' And in these words Lord *Tenterden* cautiously lays down the rule of our law, p. 240, part iii. c. 3, s. 8. It may therefore be safely taken to be either the *duty* or the *right* of the shipowner to transship in the case above supposed; if it be the former, it must be so in virtue of his original contract, and it should seem to result from a performance by him of that contract that he will be entitled to the full consideration for which it was entered into, without respect to the particular circumstances attending its fulfilment. On the other hand, if it be the latter, a right to the full freight seems to be implied; the master is at liberty to transship, but for what purpose, except for that of earning his full freight at the rate agreed on? In the case supposed, we may introduce another circumstance. Let the owner of the goods arrive, and insist, as he undoubtedly may, that the goods shall not proceed, but be delivered to him at the intermediate port; there is then no question that the whole freight at the original rate must be paid; and that because the freighter prevents the master, who is able and willing, and has a right to insist on it, from fulfilling the contract on his part, and because the sending the goods to their destination in another vessel is deemed a fulfilment of the contract.

If therefore the owner of the goods be not present, and personally exercises no option, still the shipowner, in forwarding the goods, must have the same rights, and in so doing must be taken to exercise them with the same object in view." See also *The Bonaparte*, 3 Wm. Rob. Adm. Rep. 298, 308.

Suppose however the transshipment can only be effected at a higher than the original rate of freight, the question then arises, which party is to stand to the loss? Lord Denman, in *Shipton v. Thornton*, after observing that no case of the sort, as the Court were aware of, had occurred in this country, and that it was not necessary for them to express any opinion further than as it bore upon the question before them, in that case added, "It may well be that the master's right to transship may be limited to those cases in which the voyage may be completed on its original terms as to freight, so as to occasion no further charge to the freighter; and that, where the freight cannot be procured at that rate, another but familiar principle will be introduced,—that of agency for the merchant. For it must not be forgotten that the master acts in a double capacity, as agent of the owner as to the ship and freight, and agent of the merchant as to the goods. These interests may sometimes conflict with each other, and from that circumstance may have arisen the difficulty of defining the master's duty under all circumstances in any but very general

terms. The case now put supposes an inability to complete the contract on its original terms in another bottom, and therefore the owner's right to transship will be at an end; but still, all circumstances considered, it may be greatly for the benefit of the freighter that the goods should be forwarded to their destination, even at an increased rate of freight; and if so, it will be the duty of the master as his agent to do so. In such a case the freighter will be bound by the act of his agent, and of course be liable for the increased freight. The rule will be the same whether the transshipment be made by the shipowner or the master; and in applying it, circumstances make it necessary, on the one hand, to repose a large discretion in the master or owner, while the same circumstances require that the exercise of that large discretion should be very narrowly watched."

The master however will not be justified in transshipping a cargo in a foreign port without consulting with the agent of the shipper. Thus in *Gibbs v. Grey*, 2 Hurlst. & N. 22, a cargo of guano was shipped from the China Islands to London by the 'Oriente.' The 'Oriente' having become disabled, put into Valparaiso, was condemned and her cargo taken out of her. The captain, 'for account and risk of the owner of the cargo,' chartered the 'Fairly Queen' to take on 'the cargo brought by the 'Oriente,' being 470 tons, more or less, not exceeding what

she can reasonably stow,' at the rate of £5. 2s. 6d. per ton. The owner of the cargo had an agent at Valparaiso, of which fact the captains of the 'Oriente' and the 'Fairy Queen' were aware, but no reference was made to him. After the guano had been loaded on board the 'Fairy Queen,' the captain of that vessel said he had not more than 350 tons on board; and ultimately the captain of the 'Oriente' agreed that freight should be paid on the full quantity of guano mentioned in the charter-party; and in order to carry out the agreement a bill of lading was signed by the captain of the 'Fairy Queen,' making the guano deliverable to M. & Co., the agents for the general average settlement of the 'Oriente,' or their assigns, he or they paying freight for the guano as 470 tons, as per charter-party. It was held by the Court of Exchequer that the master of the 'Oriente' had no power to bind the owners of the cargo to pay the freight mentioned in the bill of lading." "The question," said *Pollock*, C.B., "is what contract, if any, the master can make obligatory upon the merchant in regard to the conveyance by the

substituted ship when the merchant has an agent or a house of business, to the knowledge of the master, at the intermediate port into which the ship has put in distress? Can he, without communication with them, or giving them the option of receiving the cargo there, put it on board another ship and forward it to the port of discharge? We are not aware of any authority in the English law in which the master is said to have such powers." In *Shipton v. Thornton* (9 Ad. & Ell. 314), Lord *Denman*, in delivering the judgment of the Court, only put the case, "where the shipowner or master has no opportunity of consulting the freighter;" and in 'Abbott on Shipping,' before referred to (Part iv. c. 5, s. 3, p. 301, 9th ed.), the learned author says, "The merchant should be consulted if possible." In the present case the plaintiffs had an agent at Valparaiso, and indeed it would seem that a branch of the house, carrying on business in the same name, was established there; and it is stated in the case, that although all the parties knew this, no reference or communication whatever was made to them."

BIRKLEY AND OTHERS *v.* PRESGRAVE.

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Tuesday, Feb. 3rd, 1801.

[REPORTED 1 EAST, 220.]

GENERAL AVERAGE.]—*An action upon promises lies by a ship-owner to recover from the owner of cargo his proportion of general average loss, incurred by sacrificing the tackle belonging to a ship for an unusual purpose, or on an extraordinary occasion of danger, for the benefit of the whole concern.*

• In *assumpsit*, the first count alleged that the plaintiffs were owners of the ship 'Argo,' with the appurtenances of the value of £675, whereof G. A. was master, which ship, on the 3rd of November, 1799, was proceeding upon a voyage with a cargo of wheat of the value of £855; that during the voyage part of the furniture of the ship, of the value of £20, was utterly lost to the plaintiffs, and other parts thereof sustained damage to the value of £50; which loss and damage were occasioned by certain acts of the master and crew of the vessel, purposely and necessarily done by them, in order to preserve the ship and cargo from perishing by storm. That certain help and assistance were then and there obtained by the master, in order to preserve the ship and cargo from so perishing by storm, and were then and there necessary and proper for that purpose, for which the plaintiffs were obliged to pay, and did pay £20. That the ship and cargo were, by the means used for the general preservation thereof, preserved from the storm and completed the said voyage, of all which premises the defendant afterwards had notice. That the defendant was, during the time the wheat was on board the ship as aforesaid, and at the time of the loss, damage, help, and assistance aforesaid, the owner of the wheat, and was and is benefited in respect thereof by the acts of the master and crew, and by the said help and assistance; from all which respectively the loss, damage, and expenses accrued. By

reason whereof the defendant, as the owner of the wheat, became liable to contribute to the said loss, damage, and expenses in a general average; and thereupon, in consideration of the premises, the defendant promised to pay the plaintiffs so much money as he, as such owner of the wheat, was liable to contribute to the said loss, damage, and expenses in a general average, when he should be thereunto afterwards requested. And the plaintiffs averred that the defendant, as such owner of the wheat, was liable to contribute to the loss, damages, and expenses, in a general average, the sum of £40, whereof he had afterwards notice. The declaration contained two other counts; the one, *indebitatus assumpsit* for money due, payable for a general average; and the other, for money paid, laid out, and expended; with the common breach to the whole. The defendant pleaded *non assumpsit*.

This cause came on to be tried at the last assizes for Durham, before Graham, B., when a verdict was found for the plaintiffs, damages £19. 12s., subject to arbitration as to the quantum, and to the opinion of the Court as to the questions of law upon the following case:—

The ship 'Argo,' the plaintiffs being her owners, on a voyage from Wisbeach to Sunderland, laden with wheat shipped by the defendant, and of which he was sole owner, as she was entering Sunderland harbour with a fair wind, and had just passed the lower end of the North Pier, was, by the veering of the wind and of a sudden and violent squall, prevented from proceeding further into the harbour, and the crew were obliged to let go the small bower anchor to bring her up. With the assistance of some men who came to her for that purpose in a pilot-boat, they fastened the ship in order to secure and preserve her and the cargo from the storm, and with a warp which they for that purpose got run out and fastened to the South Pier; but the warp was soon broken by the storm. In order that the anchor might hold, and for the preservation of the ship and cargo, more cable was then borne away, and the ship was permitted to drive alongside the North Pier, to which they made her fast with hawser ends and towing-lines, which were proper ropes, and such as were usually provided and employed for that purpose. The master cut the cable from the best bower anchor, that was then upon the ship's bow, being afraid that another ship would be adrift and come down upon the 'Argo,' and being apprehensive that there would not be time enough to undo that cable if the other vessel should happen to drive against his ship; and therewith fastened and

moored the 'Argo' to the Pier; *and this he did for the preservation of the ship and cargo.* Whilst they were so fastening her with the cable, the other ropes (the hawser ends and towing-lines), through the violence of the storm, and by another ship driving against the 'Argo,' broke; and if there had been another minute's delay in cutting the cable, the ship would have gone adrift and sunk upon the bar at the entrance into the harbour; but she avoided that peril by means of the cutting and using that cable in manner aforesaid. Afterwards the master, for fear the ship should make water and the corn be thereby spoiled, the ship having a hole through her bottom occasioned by another ship running foul of her in the storm, got twelve men to go on board to keep her clear of water, in order that the cargo should not be damaged or spoiled. Half a guinea apiece was paid by the master for the plaintiffs to those men who went on board for this purpose, they refusing to do so under that sum; and whilst they continued in the ship they were for that purpose employed at the pumps. The damages found by the jury were calculated as the amount of what was payable to the plaintiffs by the defendant, as the owner of the cargo, in respect of the cutting and wear of the cable, the breaking of the warp, hawsers, and towing-ropes, and of the amount of what was paid by the plaintiffs for the services aforesaid, to the men who went on board the ship, and of the expense of maintaining them whilst in the ship. The question for the opinion of the Court was, whether an action can be maintained for the loss, damage, and expenses above mentioned, or any and which of them?

Holroyd for the plaintiff.

Two questions arise on this case:—1. Whether any and which of the losses are within general average? 2. Whether the owner of the ship can recover a contribution from the owner of the cargo for his proportion of expense incurred for the general concern? 1. Admitting that the hawser ends and towing-lines which were broken by the storm are not such a loss as falls within the meaning of general average, because they were only applied to the ordinary purposes for which such things are provided, yet the cable which was cut and sacrificed for the purpose of aiding the others, and thereby appropriated to a different use from what it was originally intended for, and which contributed to the preservation of the ship and cargo, does constitute a charge of general average. So does the money paid to the men who came to the vessel in

the pilot-boat, which was for the preservation of the whole concern. In *Da Costa v. Newnham* (2 T. R. 407), where a ship was obliged to put into port for the benefit of the whole concern, charges which were incurred there for taking care of the cargo, and even provisions for the workmen hired for the repairs of the ship, were deemed general average. Now the above-mentioned expenses were equally for the benefit of the whole concern, in consequence of the storm. And in Beawes's *Lex Merc.* 148, the rule is laid down that whatever expenses and losses are voluntarily incurred for the general preservation of the ship and cargo, are general average.¹ But at any rate there is one article of expense which was incurred solely on account of the cargo, and for which the defendant is solely liable, and that is the amount of what was paid to the men who were employed at the pumps on board the ship, in order to prevent the water from damaging the wheat.

2. This action is maintainable for the defendant's proportion of the general average. It is enough to say that such actions have been maintained, and verdicts recovered, without objection. They fall within the general principle of law, that where any person is bound to make contribution to another, the law implies a promise that he will do so; in other words, it is a good consideration for an implied promise. At the common law, where contribution was required, a writ of contribution issued, precedents of which are to be found in *Fitzh. Nat. Brev.* 378, 2nd edit. This has fallen into disuse, because in most instances, as many persons were concerned, a more easy remedy was administered in equity. *Bro. Abr. tit. "Suit and Contribution,"* gives several instances where contribution shall be made. So if one surety pay more than his proportion of the debt of the principal, he may recover from another the overplus. It may be said that in some cases there will be a difficulty of ascertaining the quantum of contribution in these cases, as where many have an interest in the cargo. But at any rate that difficulty does not exist in this case, and where it is too great to be unravelled at law, recourse must be had to a Court of Equity. In *Da Costa v. Newnham* before mentioned, which was an action against an underwriter, one of the questions which arose was on the quantum of the sum to be recovered, whether certain items

¹ So in the same book, folio edition, 149: "In settling a gross average, an estimate must be made of all the goods lost and saved, as well as of that the

master shall have sacrificed of the ship's appurtenances to her preservation and that of the cargo."

constituted general average or not? for if they did, he was only liable to pay a proportion, and the Court there entered into the consideration of the quantum. Here the loss being under £20, the plaintiffs could not have any remedy in equity by reason of the smallness of the demand. At any rate, however, the pay of the twelve men employed for the benefit of the cargo, to prevent its being damaged by the water coming in, may be recovered under the count for money paid.

Hullock, for the defendant, contended, first, that the action was not maintainable. The circumstance of there being no instance produced of such an action being maintained where the attention of the Court was expressly called to the question, is itself a strong argument against it, according to *Ashhurst, J.*, in *Le Caux v. Eden*, Dougl. 601. There is also a good reason why the remedy should be in equity and not at law, in order to prevent a multiplicity of actions. What the interest of each individual was in the cargo could only be ascertained upon a bill filed for a discovery. 2. At any rate, none of the losses incurred fall within general average, being the immediate effects of the storm. In the passage quoted from Beawes's *Lex Merc.* 148, one of the circumstances stated to be essential to concur to make losses of this sort general average is, that the sacrifice of the ship's furniture should be in consequence of a consultation between the captain, his officers and crew. Now here the loss was incurred by the sole orders of the master, without any deliberation of the crew, and therefore is a case for which the books do not provide. And there seems reasonable ground for this precaution, in order to prevent fraud.

Lord *Kenyon, C.J.*—If the law confer a right, it will also confer a remedy. When once the existence of the right is established, the Court will adopt a suitable remedy, except under particular circumstances where there are no legal grounds to proceed upon. Here the only difficulty pretended is the ascertainment of the proportion to be paid out of the general loss in each particular case; and since it is admitted that this may be ascertained in equity, there seems to be no reason why, if it can be ascertained without recourse to equity, an action should not lie to recover it at law. But it is objected that this will lead to a multiplicity of actions. The same difficulty, however, must occur in equity. It is not competent in general to file a bill which will conclude the interests of persons not named. There are, indeed, some excepted cases to that rule, as in the instance of creditors, one of whom may file

a bill for himself and the rest of the creditors, seeking an account of the estate of their deceased debtor for payment of their demand.¹ But, generally speaking, a Court of Equity will not take cognizance of distinct and separate claims of different persons in one suit, though standing in the same relative situation. I have known the attempt sometimes made, when an estate has been contracted to be sold in parcels to many different persons, to file a bill in the names of all of them to compel a specific performance, which has been constantly refused. Bills in equity for a discovery are for the most part auxiliary to proceedings in a Court of Law, and it does not follow that a Court of Equity has jurisdiction over the subject-matter because it would compel a discovery. Such a proceeding does not change the nature of the jurisdiction over the original matter. The objection, therefore, arising from multiplicity of actions is of no weight in a case like the present. The same inconvenience would exist if there were many persons owners of different parts of a cargo, and an injury were to happen to the whole from the misconduct of the captain; they must all bring their several actions for their respective losses, and no objection could be made to their recovery. Upon the whole this action, the grounds and nature of which are fully set out in the special count, is founded in the common principles of justice. A loss is incurred, which the law directs shall be borne by certain persons in their several proportions; where a loss is to be repaired in damages, where else can they be recovered but in the Courts of Common Law? and wherever the law gives a right generally to demand payment of another, it raises an implied promise in that person to pay.

With respect to the other question, all ordinary losses and damage sustained by the ship, happening immediately from the storm or perils of the sea, must be borne by the shipowners. But all those articles which were made use of by the master and crew upon the particular emergency, and out of the usual course for the benefit of the whole concern, and the other expenses incurred, must be paid proportionably by the defendant as general average.

The rule of consulting the crew upon the expediency of such sacrifices is rather founded in prudence, in order to avoid dispute, than in necessity: it may often happen that the danger is too urgent to admit of any such deliberation. Here, however, there can be no difficulty, for it is found in fact that the cutting of the cable which

¹ *Vide* Mitf. Ch. Pl. ch. 2, s. 2, part 8.

belonged to the ship was done for the benefit of the cargo as well as the ship.

Grose, J.—This action is brought to recover a rateable proportion of a certain loss and damage, and expenses which have been incurred by the plaintiffs as shipowners in preventing the owner of the cargo from incurring a loss. That such an action is maintainable I have no doubt. If there be not many instances of the sort to be found, it is probably because the demand has been submitted to without controversy, for I understand that this sort of damage has been continually settled as general average in the city of London. Where there is a right, there must be a remedy, and there can be no other remedy than by action to recover damages. It is true, where there are many owners of the cargo there may be as many actions brought, but that arises from the necessity of the thing, and I should still say that they are all liable to answer for their respective proportions.

Lawrence, J.—All loss which arises in consequence of extraordinary sacrifices made or expenses incurred for the preservation of the ship and cargo come within general average, and must be borne proportionably by all who are interested. Natural justice requires this. Then the only argument against this species of remedy is resolvable into this, that the plaintiff chooses to take a difficulty upon himself in proving the amount of a defendant's interest in the cargo in order to ascertain the proportion which he is bound to pay, instead of having recourse to a Court of Equity, where he can obtain proof of it more easily, and thereby facilitate his remedy. But that objection does not prove that a plaintiff cannot recover in an action whenever he can make out his case without having recourse to the assistance of a Court of Equity.

Le Blanc, J.—Unless it be shown by authority that the action does not lie, we must presume that it does, upon the common principle of justice, that where the law gives a right it also gives a remedy.

Postea to the plaintiffs.

The principle laid down in *Birkley v. Presgrave*, viz. that "*all loss which arises in consequence of extraordinary sacrifices made or expenses incurred for the preservation of the ship and cargo come within general average, and must be borne proportionably by all who are interested*," has been approved of, and adopted in subsequent cases. See *Covington v. Roberts*, 2 Bos. & P. N. C. 379; *Job v. Langton*, 6 Ell. & Bl. 790.

General average takes its origin from the Rhodian law, and was subsequently adopted by the Roman law, where it is thus stated:—"Lege Rhodiâ cavetur, ut si levandæ navis gratiâ jactus mercium factus est, omnium contributione sarcia tur quod pro omnibus datum est." Dig. xiv. tit. 2. 1. It is founded upon the clearest natural justice, for in the words of the Digest, "*Æquissimum est commune detrimentum fieri eorum, qui propter amissas res aliorum, consecuti sunt, ut merces suas salvas haberent*." Dig. lib. xiv. tit. 2. 1. 2. Again, as Lord *Tenterden* says in his excellent Treatise, "When the ship is in danger of perishing from the violent agitation of the wind, or from the quantity of water that may have forced a way into it, or is labouring on a rock or a shallow, upon which it may have been driven by a tempest; or when a pirate or an enemy pursues, gains ground, and is ready to overtake,—no measure that may facilitate the motion and passage of the ship can be really injurious to any one who is interested in the welfare of any

part of the adventure, and every such measure *may* be beneficial to almost all. In such emergencies, therefore, when the mind of the brave is appalled, it is lawful to have recourse to every mode of preservation, and to cast out goods in order to lighten the ship for the sake of all. But if the ship and the residue of the cargo be saved from the peril by the voluntary destruction or abandonment of part of the goods, equity requires that the safety of some should not be purchased at the expense of others, and therefore all must contribute to the loss." Abbott on Shipping, 388, 9th edit.

It will be observed that the principle of the Rhodian law has been considerably extended in its operation, and is not merely confined to a jettison of goods, but is equally applicable to many other cases, where *extraordinary sacrifices* have been made, or *extraordinary expenses* incurred, for the joint benefit of the ship and cargo.

Before however proceeding any further with the subject, we may notice the distinction between *general* and *particular* average, for to neglect to do so may give rise to some confusion. The distinction between them has been thus accurately laid down by Lord *Stowell*:—"General average is for a loss incurred, towards which the *whole* concern is bound to contribute *pro rata*, because it was undergone for the general benefit and preservation of the whole. *Simple* or *particular* average is not a very accurate expression; for it means da-

mage incurred by or for *one part* of the concern, which that part must bear alone; so that in fact it is no average at all: but still this expression is sufficiently understood, and received into familiar use. The loss of an anchor or cable, the starting of a plank, are matters of simple or particular average, for which the ship alone is liable. Should a cargo of wine turn sour on the voyage, it would be a matter of simple average, which the goods alone must bear; and there might be a simple average for which each would be severally liable under a misfortune happening to both ship and cargo at the same time, and from a common cause; as if a water-spout should fall on a cargo of sugars, and a plank from the same violence should start at the same time. General average is that loss to which contribution must be made by both ship and cargo; the loss, or expense which the loss creates, being incurred for the common benefit of both." Per Sir *W. Scott*, in *The Copenhagen*, 1 C. Rob. 293.

In order to give rise to a claim of general average, a loss must have been incurred for the benefit of the *whole* adventure, and not merely where a loss is incurred in consequence of a *part* being put in peril. Thus in *Nesbitt v. Lushington*, 4 T. R. 783, where a mob in Ireland seized a vessel partly laden with corn, and would not leave her until they had compelled the captain to sell them the corn at a very low rate, it was contended that it was a case of general average,

as the captain was obliged to let the people have the corn at their own price, inasmuch as if he had resisted their demand they would have destroyed the whole concern. The Court of King's Bench however did not accede to that view of the case, and Lord *Kenyon*, C. J., in delivering judgment, said, "I am of opinion that this is not a general average; because *the whole* adventure was never in jeopardy. There is no pretence to say that the persons who took the corn intended any injury to the ship, or to any other part of the cargo but the corn, which they wanted, in order to prevent their suffering in a time of scarcity. Therefore the plaintiffs could never have called on the rest of the owners to contribute their proportion, as upon a general average."

Upon the same principle, where a quantity of dollars were thrown overboard to *prevent their falling into the hands of the enemy*, though this was jettison in the general sense of the term, yet it was held not to be that species which is the subject of general average. *Butler v. Wildman*, 3 B. & Ald. 398, 403, 404.

At one time it seems to have been thought essential to the claim of general average, that previous to making a sacrifice for the general safety, there should be a deliberate and voluntary consultation between the master and the men. "The rule however of consulting the crew," as observed by *Kenyon*, C. J., in the principal case, "is rather founded in prudence,

in order to avoid dispute, than in necessity; as it may often happen that the danger is too urgent to admit of any such deliberation."

Ante, p. 70.

If the ship ride out the storm, and arrive in safety at the port of destination, the captain must make regular protests, and must swear (in which oath some of the crew must join) that the sacrifice was made for no other cause but for the safety of the ship and the rest of the cargo. 1 Park, Marine Insur. 279, by Hild. 8th ed.

In examining the cases illustrating the subject of general average, we will adopt the classification in the principal case, and consider, *first*, where general average arises in consequence of extraordinary sacrifices made; and *secondly*, where extraordinary expenses have been incurred for the preservation of the ship and cargo. We will then consider what articles are liable to contribute to general average; and lastly, what is the mode in which general average is to be adjusted.

1. General Average in consequence of extraordinary Sacrifices.

—It is clear that the jettison, or throwing overboard of part of the cargo in order thereby to preserve the ship and the rest of the goods, will enable the owner of the part so sacrificed to claim contribution as for a general average loss.

As an exception to the general rule, that all goods thrown overboard for the preservation of the ship and the rest of the cargo must

be made good by general contribution, it is established that unless the owner of goods carried on the deck can show a custom to place them there (although they must contribute in common with others), they themselves, if lost, are not the subject of general average, and cannot claim contribution from the owners of other goods and insurers. 1 Park, Insur. 284, by Hild. 8th ed. The reason for this exception seems to be that goods stowed on deck may either impede the navigation or increase the risk. See and consider Lord Denman's judgment, in *Milward v. Hibbert*, 3 Q. B. 131, 137.

Where however there is a usage to carry on board goods of a certain description, the owner will be entitled to contribution. Thus timber on a voyage between London and Quebec (*Gould v. Oliver*, 4 Bingh. N. C. 184; 5 Scott, 445) carboys of vitriol (*Da Costa v. Edmunds*, 4 Camp. 142), and pigs conveyed in a vessel from Waterford to London (*Milward v. Hibbert*, 3 Q. B. 120), although carried upon deck, having been sacrificed by a jettison for the benefit of the other parties interested, their owners were held entitled to contribution upon its being proved that they were carried according to the usage of trade. But now, by 8 & 9 Vict. c. 93, s. 24-26, no timber-laden ship clearing out of any British port in North America, or in Honduras for any port in the United Kingdom, between the 1st of May and the 1st of September, is to carry any of her cargo on deck.

Where part of the cargo shipped into lighters or boats in order to save the ship from extraordinary risk, is lost, the owners of that part of the cargo and of the lighters and boats, if they belong to the ship, can claim contribution. This is agreeable to the Roman law, which, in a similar case, says, "*Ratio haberi debet inter eos qui in nave merces salvas habent cum his qui in scaphâ perdidērunt, proinde tanquam si jactura facta est.*" Dig. lib. xiv. tit. 11, l. 4; Benecke, 209.

If however, in such a case, the ship and the rest of the cargo perish, the goods which were transshipped into lighters will not be obliged to contribute; for the lighters and their cargoes not owing their preservation to the loss of the principal vessel, cannot be liable to contribute toward such loss. Benecke, 212; Dig. lib. xiv. tit. 11, l. 4.

Nor it seems, if the ship be lost, and the cargo or part of it be saved, will the part so saved be compelled to contribute for the goods transshipped if they or a part of them be lost, although had there been a regular jettison of the goods the owners might have claimed contribution. For there is this material difference between the two cases, that when goods are cast away, the chance of their preservation is next to nothing; but when shipped into another vessel they retain nearly an equal chance with those left on board. And to this difference it is owing that the rule of not granting a contribution

unless the ship be saved, is with full justice applied to the case of unloading here considered, although in the case of jettison it would be manifestly prejudicial to the owners of the goods cast overboard, and therefore ought not to be applied to that case. Goods so transshipped may possibly be entirely saved, while the vessel and the goods left on board are wholly lost. The proprietor of the goods transshipped has therefore no right to complain that his goods may totally perish, and yet those left in the vessel and subsequently saved from shipwreck contribute nothing towards his indemnification. If, in the latter case, he were allowed a claim upon the goods saved from the principal vessel, such as is due in justice to the proprietor of goods thrown overboard, his situation would be more advantageous than that of the other proprietors and the shipowner; for his chance would in no case be worse, but in some cases better than theirs. Benecke, 212.

There will, it seems, be no contribution upon the loss of goods put into lighters or boats merely in the ordinary course of the voyage. 2 Arnould, Mar. Ins. 905, 2nd ed.

If part of the cargo be voluntarily given to pirates by way of ransom to save the rest, contribution must take place; but this will not be the case if part of the goods be taken forcibly by pirates. *Hicks v. Palington*, Moore, 297; see also *Nesbitt v. Lushington*, 4 T. R. 783.

So it is laid down by Roman

law, upon the same principle: "Si navis à piratis redempta sit, Servius, Ofilius, Labeo, omnes conferre debere aiunt. Quod vero prædones abstulerint, eum perdere, cujus fuerint: nec conferendum ei, qui suas merces redemerit" (Dig. lib. xiv. tit. 11, l. 2, § 3); but ransom to *an enemy* has been made illegal. 22 Geo. III. c. 52; and see 43 Geo. III. c. 160, ss. 34, 35; 45 Geo. III. c. 72, ss. 16, 17.

The law will protect persons who in cases of necessity sacrifice the goods of others. Thus in *Mouse's case* (12 Co. 63), where an action of trespass had been brought against a passenger for throwing the goods of the plaintiff overboard, upon its being proved by the defendant, that if the things had not been cast out of the vessel the passengers had been drowned; and that *levandi navis causâ* they were ejected, some by one passenger, and some by another, the plaintiff was nonsuited; and it was resolved that, "if a tempest arise in the sea, *levandi navis causâ* and for the salvation of the lives of men, it may be lawful for passengers to cast over the merchandises."

It has been said by an eminent writer, that if part of the cargo be *sold* for the necessities of the ship, it is in the nature of a compulsive loan for the benefit of all concerned, and bears a resemblance to the case of jettison. 3 Kent, Comm. p. 242, 4th ed. And again it was laid down by Sir William Scott, that if a master is obliged by tempestuous weather and damage

done to his ship, for the safety of the ship and cargo, to put into a port, and, not being able to borrow money, is compelled to sell a part of the cargo for the purpose of applying the proceeds to the prosecution of the voyage by the repair of the ship, the money so obtained will be the subject of general average. *The Gratitude*, ante, p. 28, 40. The great preponderance however of the authorities show that these doctrines must be received with some limitation, and that a case for general average arises only where part of the cargo has been sold in order to defray expenses or repair losses which are of themselves of the nature of general average; such, for instance, as the making good some part of the vessel, or her tackle sacrificed for the general safety; but that where a sale of part of the cargo has been effected in order to pay for the repairing particular average losses, such, for instance, as arise from *accidental damage* done to a ship by a storm, the shipowner will alone be liable to the owners of the goods so sold. See *Powell v. Gudgeon*, 5 M. & S. 431; *Sarguy v. Hobson*, 4 Bingh. 131; *Hallett v. Wigram*, 9 C. B. 580, 586. Upon the same principle, where a part of the cargo was sold in order to raise money to release the master from imprisonment for a private debt in a foreign port, it was held not to be the subject of general average. See *Dobson v. Wilson*, 2 Campb. 480. There the master of a ship then at Copenhagen was arrested by pro-

cess out of a court of justice, at the suit of the agent of the ship, for sums of money the latter had disbursed on her account, partly for repairs and partly in payment of the Sound dues; and the master not being able to raise the money by other means, that he might procure his liberation and pursue the voyage, sold a part of the cargo: it was held by Lord *Ellenborough*, C.J., that the owner of the goods so sold had no right to a contribution in the nature of general average from the shippers of the other goods on board which arrived safely at the port of destination. "I am of opinion," said his lordship, "that this is not a case upon which general average can be claimed. Is there here anything like a *jactus mercium levandæ navis gratiâ*? A jettison to lighten the ship is not the only foundation of general average; but it must arise from that or something analogous. The distinction between general and particular average would otherwise be entirely abolished, and the shippers of goods would be called upon to contribute to losses from which they derive no benefit, and which ought to fall exclusively on the shipowner. Here the agent of the ship arrests the person of the master, both being agents of the owner, who had undertaken to carry the whole cargo safely to its destined port. This is different from the arrest of the captain by a foreign force. Even there I am not aware it has ever been held that the master is so inseparably united to the ship, that to redeem him it is lawful to sell a part

of the cargo. The process of the court of justice at Copenhagen was not directed against the ship, and was confined entirely to the person of the master; it was merely an arrest for a personal debt. I was at first struck by what was said about the Sound dues; and had the ship been seized for non-payment of these, I should have thought the sale of a part of the cargo to pay them, in the absence of all other means to raise money for that purpose, might have been the foundation of a claim for general average. But these dues had been paid to the Danish Government by the ship's agent, and the money so paid merely constituted a private debt due to him, which he sought to recover by process against the person of the master. It comes to this,—whether, if the captain be severed from the ship, whatever be the cause, he may sell a part of the cargo to redeem himself? I see no distinction between this arrest for debt and an arrest for an assault he might have committed in the streets of Copenhagen. No case has been cited, or principle advanced, to show that a claim for general average can arise from an act done to redeem the master of a ship from such an imprisonment. I therefore do not think that any part of the plaintiffs' goods was sacrificed for the safety of the ship and the residue of the cargo, in such a manner as to give them a right to a contribution from the other shippers of goods on board. Their proper remedy is against the owner of the ship."

Where, as in the principal case,

some part of the ship or her tackle is sacrificed for the safety of the whole concern, the shipowner can claim contribution as for a general average loss.

Thus if in a tempest the sails of a ship are cut down and cast overboard, for the preservation of the ship and cargo, it will be a case for contribution. *Marshall v. Dutrey*, Select Cases of Evidence, 58. So likewise by the Roman law it is said, "Cum arbor, aut aliud navis instrumentum, removendi communis periculi causa, dejectum est, contributio debetur." Dig. lib. xiv. tit. 2, l. 3.

Where however the loss sustained by a ship is *accidental*, the loss will fall on the shipowner alone. Thus where a ship, in order to escape from a privateer, carried an unusual press of sail, and succeeded in getting away, but sustained damage in so doing, it was held to be a particular and not a general average. See *Covington v. Roberts*, 2 Bos. & P. N.C. 378; where counsel having cited the principal case, Sir James Mansfield, C.J., observed, "In the case referred to there was an article given up for the benefit of the whole concern. A cable was sacrificed. The language of Mr. Justice Lawrence is, that all loss which arises in consequence of *extraordinary sacrifices* or expenses incurred for the preservation of the ship and cargo come within the description of general average. This is only a *common sea risk*. If the weather had been rather better, or the ship stronger, nothing might have happened."

Upon the same principle, the expenses which may be incurred in consequence of a successful resistance of an attempt by an enemy to capture a vessel, such as for damage done to the vessel itself and its rigging in the engagement, and the expense of curing the wounded sailors, or in ammunition expended in the defence, will not form the subject of general average. This was decided in the leading case of *Taylor v. Curtis* (2 Marsh. 309), by the Court of Common Pleas. *Gibbs*, C. J., in delivering the judgment of the Court, said, "The different states of Europe have made different regulations on this subject, all of them professing to follow the Rhodian law, but often differing from each other; and the foreign jurists have made very different comments upon that law. In this country there are no local regulations on this subject; we should therefore, as in all doubtful cases, resort to the judgments of our municipal courts, if this point had ever arisen there. There is nothing in any of the foreign jurists which we think ought to govern us on these points, unless they had been supported by admitted principles, decided authorities, or general usage. None of the decided cases apply to the present; and we have unfortunately been so long engaged in war, that instances of this kind must frequently have occurred; and as there appears to be no case in which a demand like the present has been made, we must conclude from that silence that no general usage which

could justify such a demand has existed; and therefore that such losses cannot be taken to fall within the principle of general average. If it could have been shown that such losses do fall within the general principle, I agree that the plaintiffs would have been entitled to recover, though this had been the first case in which such a demand had been made. But there is great doubt upon the subject; and the inclination of my mind is that they do not. It is true the determination to resist was resolved on for the general interest; but still it is not like the case of casting goods overboard for the general benefit. The loss fell where the chance of war directed it, and where therefore, in point of justice, it ought to fall." See S. C. 6 Taunt. 608; 4 Camp. 334; Holt's N. P. 192; see also Dig. lib. xiv. tit. 2, l. 2, § 1; *ib.* l.

It seems to be the better opinion that if, in order to escape an enemy or to avoid shipwreck, a ship is *intentionally* run aground in what appears the least dangerous spot, the loss arising therefrom (at all events if the ship is subsequently recovered so as to be able to pursue her voyage) will be a general average loss, because its object was the general safety. Emerigon, c. xii. sect. 13, vol. 1, pp. 405-600, ed. 1827; Abbott on Shipping, 400, 9th ed.; 2 Arn. Mar. Ins. 915, 2nd ed. And it has been decided in the great case of *The Colombian Insurance Company v. Ashby* (13 Pet. Sup. Court Rep. 331), by Mr. Justice Story, after an examination of all

the authorities upon the subject, that, even if the ship be lost by a voluntary stranding for the benefit of the general safety, the cargo, if saved, must contribute as for a general average loss. In that case the brig 'Hope,' with a cargo bound from Alexandria, in the district of Columbia, for Barbadoes, insured in Alexandria, was assailed, while standing down the Chesapeake Bay, by a storm, which soon after blew to almost a hurricane. The vessel was steered towards a point in the shore for safety, and was anchored in three fathoms water; the sails were furled, and all efforts were made, by using the cables and anchors, to prevent her going on shore. The gale increased; the brig struck adrift and dragged three miles; the windlass was ripped up, the chain cable parted, and the vessel commenced drifting again, the whole scope of both cables being paid out. The brig then brought up below Craney Island, in two and a half fathoms water, where she thumped or struck on the shoals on a bank, and her head swinging round brought her broadside to the sea. The captain, finding no possible means of saving the vessel and cargo and preserving the lives of the crew, slipped her cables, and ran her on shore for the safety of the crew and preservation of the vessel and cargo. The vessel was run far up on a bank, where after the storm she was left high and dry, and it was found impossible to get her off. The lives of all the persons were saved, and the whole cargo was taken out

safely. It was held that the owners of the cargo were liable for a general average. "According to the Roman law," says Mr. Justice *Story*, "if the ship was injured or disabled in a storm without any voluntary sacrifice; or if she foundered or was shipwrecked without design, the goods saved were not bound to contribution (Dig. lib. xiv. tit. 2, l. 2, § 1; *ib. c. 7*; 1 Emerig. on Assur. c. 12, § 39, pp. 601-603). On the other hand, if the object of the sacrifice was not attained; or if there was a jettison to prevent shipwreck, or to get the ship off the strand, and in either case it was not attained; as there was no deliverance from the common peril, no contribution was due (Dig. lib. xiv. tit. 2, l. 5, § 7; 1 Emerig. on Assur. c. 12, § 41, pp. 612-616). The language of the Digest upon this point is very expressive:— '*Amisæ navis damnum collationis consortio non sarcitur per eos, qui merces suas naufragio liberaverunt; nam hujus æquitatem tunc admitti placuit, cum jactus remedio cæteris in communi periculo, salvâ nave consultum est.*' It is this language which seems in a great measure to have created the only doubt among the commentators as to the extent and operation of the rule; some of them having supposed that the safety of the ship (*salvâ nave*) for the voyage was in all cases indispensable to found a claim to contribution; whereas others, with far more accuracy and justness of interpretation, have held it to apply as a mere illustration of the general doctrine, to a jettison, made in

the particular case, for the very purpose of saving the ship and the residue of the cargo. . . . It is true that Emerigon in one place says, 'The damages which happen by stranding are a simple average for the account of the proprietors,' citing the French ordinance; and then adds, 'but it will be a general average if the stranding has been voluntarily made for the common safety, provided always that the ship be again set afloat; for if the stranding be followed by shipwreck, then it is *save who can*' (Emerigon, Assur. c. 12, s. 13, p. 614). And he then refers to the case of jettison, where the ship is not saved thereby, in which case there is no contribution (Emerigon, Assur. c. 12, s. 13, p. 616). Now the analogy between the two cases is far from being so clear or so close as Emerigon has supposed. In the case of the jettison to avoid foundering or shipwreck, if the calamity occurs, the object is not attained. But in the case of stranding, whatever is saved, is saved by the common sacrifice of the ship; although the damage to her may have been greater than was expected. Surely the question of contribution cannot depend upon the amount of the damage sustained by the sacrifice; for that would be to say, that if a man lost all his property for the common benefit, he should receive nothing; but if he lost part only, he should receive full compensation. No such principle is applied to the total loss of goods sacrificed for the common safety; why then should it be applied to

the total loss of the ship for the like purpose? . . . We agree with the Court below that when a ship is voluntarily run ashore, it does not of course follow that she is to be lost. The intention is not to destroy the ship, but to place her in less peril, if practicable, as well as the cargo. The act is hazardous to the ship and cargo, but it is done to escape a more pressing danger,—such as a storm, or the pursuit of an enemy or pirate. But then the act is done for the common safety; and if the salvation of the cargo is accomplished thereby, it is difficult to perceive why, because from inevitable calamity the damage has exceeded the intention or expectation of the parties, the whole sacrifice should be borne by the shipowner, when it has thereby accomplished the safety of the cargo.” See also *Job v. Langton*, 6 Ell. & Bl. 779.

2. *General Average in consequence of extraordinary Expenditure.*—The cases we have been before considering are those where a sacrifice of something has given rise to the claim of general average; it may also be made where there have been extraordinary expenses incurred for the joint benefit of the ship and cargo. If, for instance, a ship is compelled to go into a port for repairs, and it is for the common benefit, as well for the preservation of the cargo as for the repair of the ship, that there should be a transshipment of the cargo, the expense there of will be a general average. *The Copenhagen, Mening*,

1 C. Rob. 289, 294. The expenses necessarily incurred in such a case, in unloading and reloading the cargo for the purpose of repairing the ship, that she may be made capable of proceeding on the voyage, have been held to give a claim to general average contribution. *Hall v. Janson*, 4 Ell. & Bl. 500, 507, 508.

Where a ship in the course of her voyage was run foul of by another ship and damaged, and the captain was in consequence obliged to cut away part of her bowsprit rigging, and to return to port to repair the damage and cutting away, without which the ship could not have prosecuted her voyage or safely kept the sea; it was held by the Court of King’s Bench that the expenses of repairs, so far as they were absolutely necessary to enable the ship to prosecute the voyage, but no further, and of unloading the goods for the purpose of making the repairs, were a general average; but that the master’s expenses during the unloading, repairing, and reloading, and crimpage to replace deserters during the repairs, were not so. “If,” said Lord *Ellenborough*, C. J., “the return to port was necessary for the general safety of the whole concern, it seems that the expenses unavoidably incurred by such necessity may be considered as the subject of general average. It is not so much a question whether the first cause of the damage was owing to this or that accident,—to the violence of the elements or the collision

of another ship, as whether the effect produced was such as to incapacitate the ship, without endangering the whole concern, from further prosecuting her voyage unless she returned to port and removed the impediment. As far as removing the incapacity is concerned, all are equally benefited by it, and therefore it seems reasonable that all should contribute towards the expenses of it; but if any benefit *ultra* the mere removal of this incapacity should have accrued to the ship by the repairs done, inasmuch as that will redound to the particular benefit of the shipowner only, it will not come under the head of general average; but that will be a matter of calculation upon the adjustment. The amount of expenses of repairing to be placed to the account of general contribution must be strictly confined to the necessity of the case, and the arbitrator will have to determine how much was expended upon such repairs as were absolutely necessary to enable the ship with her cargo to prosecute the voyage; and for so much, and no more, the defendant will be liable to contribute. As to the charge for the captain's expenses during the unloading, repairing, and reloading, the shipowner must bear the captain's expenses in port, and crimpage must be disallowed, as it does not come within general average." *Plummer v. Wildman*, 3 M. & S. 482.

Now although the decision in *Plummer v. Wildman* is right, the rule which might fairly be de-

duced from the observations of Lord *Ellenborough* would, according to the subsequent authorities, be clearly wrong. The decision in *Plummer v. Wildman* is right, because the expenses allowed by the Court were incurred in consequence of a general average loss, viz. *the cutting away of the bowsprit rigging*; but the conclusion to be drawn from Lord *Ellenborough's* remarks is wrong, because if it were followed, the expense of repairs done to a ship in a port of distress, so far as they are just sufficient to enable the ship to complete her voyage, would in all cases be allowed, whatever might be the nature of the loss which rendered the repairs necessary. This doctrine however Lord *Ellenborough* disclaimed in the subsequent case of *Power v. Whitmore*, 4 M. & S. 141, where it was held that the wages and provisions of the crew while a ship remained in port, whither she was compelled to go for the safety of ship and cargo, in order to repair *a damage occasioned by tempest*, were not the subject of general average; nor the expenses of such repair; nor the wages and provisions of the crew during the detention in port to which she returned, and was detained there on account of adverse winds and tempest; nor the damage occasioned to the ship and tackle, by standing out to sea with a press of sail in tempestuous weather, which press of sail was necessary for that purpose in order to avoid an impending peril of being driven on

shore and stranded. Lord *Ellenborough*, C. J., said, "That general average must lay its foundation in a sacrifice of part for the sake of the rest; but here was no sacrifice of any part by the master, but only of his time and patience, and the damage incurred was by the violence of the wind and the weather. That this was not like the case recently before the Court (*Plummer v. Wildman*, 3 M. & S. 482), where the master was compelled to cut away his rigging in order to preserve the ship, and afterwards put into port to repair that which he sacrificed. And still less was the damage incurred while standing out to sea, an object of contribution."

The wages and provisions of a crew during the detention of a ship by an embargo do not come within general average. *Robertson v. Ever*, 1 T.B. 127; sed vide *Sharp v. Gladstone*, 7 East, 24.

The expense of hiring extra hands to work at the pumps in a ship after she has sprung a leak will be allowed in general average (*Birkley v. Presgrave*, ante, p. 74), but not of hiring men in the place of those who have deserted. *Plummer v. Wildman*, 3 Mau. & Selw. 482.

Where a vessel is fortuitously stranded, all expenses incurred from the misadventure till all the cargo has been discharged will constitute general average. *Job v. Langton*, 6 Ell. & Bl. 779, 791.

Where however, after the cargo is safe, expenses have been incurred in repairing a ship accidentally stranded, or in bringing her to a

place to be repaired, they will not be the subject of general average. Thus in *Job v. Langton*, 6 Ell. & Bl. 779, in a case stated between assured and underwriters on ship, it appeared that the ship having sailed from Liverpool with a cargo on board, ran on shore accidentally on the coast of Ireland. In order to get her off it became necessary to discharge the whole of the cargo, which was accordingly taken out and placed in store at Dublin. The ship was then got off by digging a channel for her, and employing a steam-tug, and was towed to Liverpool to be repaired. The cargo was shipped in another vessel, and forwarded to its destination, but for the purposes of the case, was to be considered as having been carried on by the original ship after she had been repaired. It was held by the Court of Queen's Bench, that the expenses incurred, after the entire cargo was in safety, in getting off the ship and towing her to Liverpool for repair, were not chargeable to general average, but to particular average on the ship alone. "There is no decision," said Lord *Campbell*, C. J., "on the specific point; and there is no mercantile usage stated to guide us. We must therefore resort to the general principles on which this head of insurance law rests. We begin with the definition of general average by *Lawrence*, J., in *Birkley v. Presgrave* (1 East, 228):—"All loss which arises in consequence of extraordinary sacrifices made or extraordinary expenses incurred for the preservation of the

ship and cargo" (meaning for the joint benefit of ship and cargo). Here it cannot be said that there was any *sacrifice*, as in case of jettison of part of the cargo, or voluntarily cutting away masts or sails of the ship. The stranding was *fortuitous*, arising directly from perils of the sea. The expenses, to constitute general average, must therefore be brought within the second category, "extraordinary expenses incurred for the joint benefit of ship and cargo." They were extraordinary expenses not to be ascribed to wear and tear, and therefore to be borne by the underwriter; but are they to be considered as incurred for the joint benefit of ship and cargo, so that a portion of them ought to be borne by the owner of the cargo or the underwriter of the cargo? Although the stranding was fortuitous, all expenses incurred from the misadventure, till all the cargo had been discharged, confessedly constituted general average. But how can it be said that the subsequent expenses in getting off the ship and taking her to Liverpool for repair were of the same character? The employment of the steam-tug and the cutting of the channel by which the ship was rescued cannot, as was contended for, be part of the same operation as the unloading of the cargo; for the case expressly finds that the steam-tug did no work at the ship until after the cargo was landed, and the coals and ballast taken out of her. We do not see how these expenses are to be distinguished from the expenses of

repairing the ship when she had been brought to Liverpool, which, it is admitted, must fall exclusively on the owner of the ship, or the underwriter on ship, as particular average. If the owner of the ship was to earn the stipulated freight by carrying the cargo to Newfoundland, it was his duty to repair her and to carry her to a place where she might be repaired. Under the circumstances, after the cargo had been safely discharged and warehoused; it does not even appear that it was for the advantage of the owner of the cargo that the ship should be got off the strand and repaired. Of course we do not, contrary to the intention of the parties, attach any importance to the fact that the cargo was forwarded in another vessel; and we shall give our decision as if the stranded ship, after being repaired, had carried the cargo to its ultimate destination. But in the absence of any statement to the contrary, we might infer (as the fact turned out to be) that there would be no difficulty in forwarding the cargo by another vessel. We do not say that there may not be a case where, after a fortuitous stranding of the ship and the cargo has been unloaded, expense voluntarily incurred by the owner of the ship to get her off, and to enable her to complete the voyage, whereby the cargo, which otherwise must have perished, is carried to its destination, may be general average; as the stranding of a ship with a perishable cargo on a desert island in a distant region of the globe. But in the present case,

the owner of the ship, after the cargo was discharged, appears to us to have done nothing except in the discharge of his ordinary duty as owner, and for the exclusive benefit of the ship. Notwithstanding some expressions of Lord *Ellenborough* in *Plummer v. Wildman* (3 M. & S. 482, 486), we consider it quite settled that, by the law of this country, the expenses of repairing the ship, or, after the cargo is safe, of bringing her to a place to be repaired, cannot, under such circumstances, be made the subject of general average."

Where however a vessel has been fortuitously stranded, although the goods have been saved before the vessel, still if their discharge from the ship form part of one continuous operation, the object of which was the saving of the ship and cargo, the expenses incurred in getting the ship off, and without which she could not have proceeded on her voyage or earned freight, will be general average to which ship, freight, and cargo must contribute. See *Moran v. Jones*, 7 Ell. & Bl. 523.

3. *What Articles are liable to contribute to general Average.*—According to our law, whatever was at risk at the time of the loss, *i. e.* the ship, freight, and cargo, must contribute an equal and proportional part to what was sacrificed for the common good. 1 Park, Ins. by Hild, 8th ed. p. 294; and see *Da Costa v. Newnham*, 2 T. R. 407; *Hill v. Patten*, 8 East, 373; *Brown v. Stapyleton*, 4 Bing. 119.

In the case of *Williams v. The London Assurance Company*, 1 M. & S. 318, a ship was chartered from London to the East Indies, there to deliver her outward cargo, and return thence with a cargo for England into the Thames, and there make a true delivery; and it was agreed that the charterers should, upon condition that the ship performed her voyage and arrived at London, and not otherwise, pay freight for every ton of goods that should be brought home at so much per ton. The ship sailed on the voyage insured, and in the course of her outward voyage incurred an average loss; but was repaired and afterwards performed her voyage, and the freight was received. It was held by the Court of King's Bench that the freight was liable to contribute to general average, and that the underwriter was entitled to deduct in respect of such contribution. "It was contended," said Lord *Ellenborough*, C. J., "that the whole freight out and home is not liable, but the whole was affected and might have been frustrated by the loss, and was eventually preserved to the owners by the repairs done to the ship. It is true indeed that if this action had been commenced immediately upon the loss happening, it would not have been open to the defendants to say that the plaintiff was recouped in damages by a contribution in respect of freight which at that time was contingent. But the case now before us is argued upon an admission that the freight

has actually been received; and therefore now the amount of the damages must be that of the original damage, minus the amount of the plaintiff's contribution; and the difficulty as to the outward and homeward voyage seems to be removed by the consideration that the whole freight was saved by the repairs." *Richardson v. Nourse*, 3 B. & Ald. 237.

Usually where there is a general average, ship, freight, and goods, all contribute to it; but if there be no goods on board, and, by a voluntary sacrifice, ship and freight are saved from a common peril, the freight ought rateably to contribute to the loss; and where there are separate insurances on ship and freight, the calculation must be made as to the amount of the contribution by each, although the whole of the freight which was in peril is to be received by the owner of the ship, and without insurance the whole of the loss would fall upon him. Per Lord *Campbell*, C.J., 7 Ell. & Bl. 533.

Wearing apparel and jewels, if carried about the person, do not contribute (*Emerig. c. 12, § 42, vol. 1, p. 623*); but it has been decided that, if not attached to the person, gold, silver, jewels, precious stones, and all other small articles of value must contribute. *Peters v. Milligan*, Park, 296, 8th ed.

As we have already seen, goods carried on the deck must contribute, even although in certain cases they cannot claim contribution (*ante*, p. 83); but provisions and warlike stores have always

been considered as an exception to the rule respecting contribution. *Brown v. Stapleton*, 4 Bing. 119.

4. *As to the Mode of adjusting general Average.*—There is a well-known distinction in the case of general average arising from *expenditure*, and that which arises from a *sacrifice* made for the benefit of all. In the case of *expenditure* for the general benefit, the person making it must be reimbursed, whether the ship and cargo be eventually saved or not. *Bencke*, 251; 2 *Arnold*, Marine Ins. 938. Where a *sacrifice* has been made of a part of the concern for the benefit of the whole, the property sacrificed is considered as if it had never been lost, and is valued with the rest of the property which is saved, and is made to contribute its share towards making good the average loss occasioned by its sacrifice. Suppose, for instance, a jettison to be made of property belonging to A., of the value of £1000, and that the rest of the property belonging to B. were worth £9000, there would then be two sources of contribution, viz. the property of A. which had been sacrificed, and the property of B. which had been saved; each would have to make up between them the sum of £1000; and for that purpose would have to contribute one-tenth of the value of their respective properties, viz. A. in respect of the £1000 would contribute £100, and B. in respect of the £9000 would contribute £900; in effect, B. would have to pay A. £900, and

A.'s share of the loss would amount to £100. This is evidently just, for if the goods sacrificed did not contribute, the owner thereof receiving their full value, would suffer no loss by the sacrifice, while the owner of other property would. Boulay Paty, *Comm. on Emer.* vol. 1, p. 632, ed. 1827.

Where however, after a *sacrifice* of part of the property for the general benefit, the rest of the property perishes, there will be no contribution, for there is nothing to contribute from, and nothing to contribute for. 2 Arn. Marine Insur. 939, 940.

It seems that where part of the cargo has been sold for necessary expenses, if they are of a character which a shipowner is bound to defray, he will have to reimburse the owner, whatever may be the result of the voyage; if however the expenses were of an extraordinary character, incurred for the general benefit, and coming strictly within the definition of general average, their sale would be looked upon in the same light as a jettison for the general benefit, and if the whole adventure subsequently perished, no contribution would be due. See 2 Arn. Mar. Insur. 940, 2nd ed.; *Powell v. Gudgeon*, 5 M. & S. 431.

Where goods are jettisoned, the loss occasioned thereby is ascertained by estimating the net value they would have sold for at their port of destination, deducting freight, duty, and landing expenses. Benecke, 289; 2 Arn. Mar. Ins. 946, 2nd ed.; *Richardson v.*

Nourse, 3 B. & Ald. 239. Where however the ship puts back into the port of departure, and the adjustment takes place there, they will, for the purpose of contribution, be valued at their cost price, including shipping charges, and premiums of insurance. Benecke, *Pr. of Indem.* 289; *Tudor v. Macomber*, 14 Pick. Rep. 34.

Where loss has arisen by a sacrifice of a part of a ship, it must be valued at the cost of the repairs, deducting one-third new for old. 2 Arn. Mar. Ins. 949, 2nd ed.

Loss of freight will be estimated at the gross sum which would have been earned by the goods jettisoned or sold. *Ib.* And the expenses of raising money abroad for disbursements, at the amount actually expended, including interest, both ordinary and marine, and the loss incurred by discount and exchange. *Ib.*

The contributory value of the ship is her worth to the owners in the state in which she arrives (2 Arn. Mar. Ins. 951, 2nd ed.); the contributory value of freight is the actual sum finally received as freight by the shipowner, after deducting all the expenses of earning it, as the wages of the master and crew. *Ib.* 953-957; and see *Williams v. London Assurance Company*, 1 Mau. & Selw. 318. Goods contribute on their net actual value, *i.e.* on their market price at the port of adjustment, free of all charges for freight, duty, and expenses of landing. 2 Arn. Mar. Ins. 957, 2nd ed.

When a case of general average

occurs, if it is settled in a foreign port of destination, or in any other foreign port where it rightfully ought to be settled, the adjustment there made will be conclusive as to the items, as well as the apportionment thereof upon the various interests, although it may be different from what our own law would have made in case the adjustment had been settled in our own ports. *Simonds v. White*, 2 B. & C. 805; *Dalgleish v. Davidson*, 5 Dowl. & Ry. 6.

It seems also that the underwriter is in all cases bound by a foreign adjustment of general average when it is regularly settled according to the laws and usages of the foreign port; but unless it be clearly proved to have been settled in strict conformity with such laws and usages, he is in no case bound thereby, if it would not be general average in this country. 2 Arn. on Mar. Insur. 962; and see *Newman v. Cazalet*, Park, 900, 8th ed.; *Walpole v. Ewar*, ib. 898; *Power v. Whitmore*, ib. 4; *Mau. & Selw.* 141.

The sole parties primarily liable to contribution are the owners of the ship, freight, and goods (2 Arn. Mar. Insur. 965, 2nd ed.), and the master has a lien on the goods for general average. *Scaife v. Tobin*, 3 B. & Ad. 528, per Lord *Tenterden*, C. J.

A mere consignee (not being the owner) of goods receiving them in pursuance of a bill of lading, whereby the shipowner agrees to deliver them to the consignee by name, he paying freight, is not

liable for general average, although he has had notice, before he received the goods, that they had become liable to general average (*Scaife v. Tobin*, 3 B. & Ad. 523); and Lord *Tenterden* said that it might "perhaps be prudent in future to introduce into a bill of lading an express stipulation that the party receiving the goods shall pay general average." *Ib.* 528.

If the owner of freight, ship, or cargo, who has sustained an average loss, is insured, he can call upon the underwriters to reimburse him, not the full amount of his contribution, but that proportion of it which the value of his interest as insured bears to its value as estimated for the purposes of contribution. 2 Arn. Mar. Ins. 950.

We may here mention that it seems at one time to have been thought that the Court of Equity had sole jurisdiction in cases of general average contribution (*Sheppard v. Wright*, Show. P. C. 18); the Court of Equity however, it is clear from the principal case, has only a concurrent jurisdiction; and though in very complicated cases it may be the most convenient tribunal, yet it has been decided that an action at law will lie by one shipper of goods against another (*Dobson v. Wilson*, 3 Camp. 480); or, as in the principal case, by the shipowner against the owners of the cargo (see also *Price v. Noble*, 4 Taunt. 123); or by either the shipper of goods or the shipowner against the underwriter. *Milward v. Hibbert*, 3 Q. B. 120

WOOLRIDGE v. BOYDELL.

Mich. Term, 19 Geo. III., 1778.

[REPORTED DOUGL. 16 A.]

INSURANCE.—IMPLIED WARRANTIES.]—*If a ship insured for one voyage sails upon another, though she be taken before the dividing point of the two voyages, the policy is discharged.*

The ship 'Molly' being insured "at and from Maryland to Cadiz," was taken in Chesapeake Bay, in the way to Europe. Upon this, the insured brought this action against the defendant, one of the underwriters on the policy. The trial came on at Guildhall before Lord *Mansfield*, when a verdict was found for the defendant; and a new trial being moved for, the material facts of the case appeared to be as follows:—The ship was cleared from Maryland to Falmouth, and a bond given that all the enumerated goods were to be landed in Britain; and all the other goods in the British dominions. An affidavit of the owner stated that the vessel was bound for Falmouth. The bills of lading were "to Falmouth and a market." And there was no evidence that she was destined for Cadiz. The place where she was taken was in the course from Maryland both to Cadiz and Falmouth, before the dividing point. Many circumstances led to the suspicion that she was, in truth, neither designed for Falmouth nor Cadiz, but for the port of Boston, to supply the American army; but there was not sufficient direct evidence of that fact. At the trial, Lord *Mansfield* told the jury, that if they thought the voyage intended was to Cadiz, they must find for the plaintiff. If, on the contrary, they should think there was no design of going to Cadiz, they must find for the defendant.

The *Solicitor-General*, *Dunning*, and *Davenport*, argued for the new trial.

They contended that this was like the cases of an intention to

deviate where the capture had taken place before the deviation was carried into execution; and they cited *Foster v. Wilmer* (H. 19, s. 2), 2 Stra. 1249; *Carter v. The Royal Exchange Assurance Company*, cited in *Foster v. Wilmer*, and *Rogers v. Rogers*, a very late case in this Court. They besides urged, that by "a market" in the bills of lading, and in the instructions to the broker (where that expression was used, but which I believe had not been read at the trial), was meant Cadiz. And that "to Falmouth and a market," might be considered as meaning to the market at Cadiz, first touching at Falmouth. (It appeared in evidence at the trial, that the premium to insure a voyage from Maryland to Falmouth, and from thence to Cadiz, would have exceeded greatly what was paid in this case.)

Lee and *Baldwin* showed cause. They argued that here there had been no inception of the voyage insured, and therefore the case was very different from those cited by the counsel for the plaintiff.

Lord Mansfield.—The policy, on the face of it, is from Maryland to Cadiz, and therefore purports to be a direct voyage to Cadiz. All contracts of insurance must be founded in truth, and the policies framed accordingly. When the insured intends a deviation from the direct voyage, it is always provided for, and the indemnification adapted to it. There never was a man so foolish as to intend a deviation from the voyage described when the insurance is made, because that would be paying without an indemnification. Deviations from the voyage insured arise from after-thoughts, after-interest, after-temptation; and the party who actually deviates from the voyage described means to give up his policy. But a deviation merely intended, but never carried into effect, is no deviation. In all cases of that sort the *terminus à quo*, and *ad quem*, were certain and the same. Here, was the voyage intended for Cadiz? There is not sufficient evidence of the design to go to Boston for the Court to go upon. But some of the papers say to Falmouth and a market, and some to Falmouth only. None mention Cadiz, nor was there any person in the ship who ever heard of any intention to go to that port. "A market" is not synonymous to "Cadiz;" that expression might have meant Leghorn, Naples, England, etc. No man, upon the instructions, would have thought of getting the policy filled up to Cadiz. In short, that was never the voyage intended, and consequently is not what the underwriters meant to insure.

Willes and *Ashurst*, Justices, of the same opinion.

Buller, J.—I am of the same opinion. I believe the law to be according to the authorities mentioned on the part of the plaintiff, but it does not apply here. This is a question of fact. There cannot be a deviation from what never existed. The weight of evidence is, that the voyage was never designed for Cadiz.

The rule discharged.

DIXON v. SADLER.

Excheq. of Pleas. Trin. Term, 2 Vict. 1839.

[REPORTED 5 MEES. & WELSB. 405.]

To a declaration on a time Policy for six months, stating a loss by perils of the sea, the defendant pleaded, that though the vessel was lost by perils of the sea, yet that such loss was occasioned wholly by the wrongful, negligent, and improper conduct (the same not being barratrous) of the master and mariners of the ship, by wilfully, wrongfully, negligently, and improperly (but not barratrously) throwing overboard so much of the ballast that the vessel became unseaworthy, and was lost by perils of the sea, which otherwise she would have encountered and overcome. The jury having, at the trial, found a verdict for the defendant, the underwriter, on this issue,—Held, on a motion for judgment non obstante veredicto, that the plea was bad, and that the underwriters were liable for the consequences of this wilful but not barratrous act of the master and crew, in rendering the vessel unseaworthy before the end of the voyage, by throwing overboard a part of the ballast.

Assumpsit on a policy of insurance, dated the 22nd of January, 1838, on the ship 'John Cook,' and cargo, at and from the 17th of January, 1838, until the 17th of July, 1838, at noon, in port and at sea, at all times and in all places, being for the space of six calendar months. The declaration averred the loss of the ship to have taken place on the 19th of May, 1838, by perils of the sea. The

defendant pleaded, first, that the vessel was not lost by the perils of the sea; secondly, the following special plea:—"That, though true it is that the said vessel was by the perils of the sea wrecked, broken, damaged, and injured, and became and was wholly lost to the plaintiffs, for plea nevertheless the defendant says, that the said wrecking, breaking, damaging, and injuring the said vessel, and the loss of the same by the perils of the sea, as in the said first count mentioned, was occasioned wholly by the wilful, wrongful, negligent, and improper conduct (the same not being barratrous¹) of the master and mariners of the said ship, whilst the said ship was at sea, as in the said first count mentioned, and before the same was wrecked, broken, damaged, injured, or lost, as therein mentioned, to wit, on the 19th of May, 1838, by wilfully, wrongfully, negligently, and improperly (but not barratrously) throwing overboard so much of the ballast of the said ship, that by means thereof she then became and was top-heavy, crank, unfit to carry sail, and wholly unseaworthy, and unfit and unable to endure and encounter the perils of the sea which she might and would otherwise have been able to have safely encountered and endured; and by means and in consequence of the said wilful, wrongful, negligent, and improper (but not barratrous) conduct of the said master and mariners, the said ship became and was wrecked, broken, damaged, injured, and lost by perils of the sea, which perils, but for the said conduct of the said master and mariners, she could and would have safely encountered and overcome without being so wrecked, broken, damaged, injured, and lost as in the said first count is mentioned." Verification.

There were other pleas, but the question turned alone on the issue raised by the second plea. The plaintiff replied to it, "that the said wrecking, breaking, damaging, injuring the said vessel, or the loss of the same by the perils of the sea, as in the first count mentioned, was not so occasioned by such conduct of the master or mariners of the said ship, in manner and form as in the said plea is alleged," etc.

At the trial before *Parke, B.*, at the last Spring Assizes for Northumberland, it appeared that the plaintiff was a shipowner residing at Sunderland, and was the owner of the 'John Cook,' and had effected the policy in question with the defendant, an underwriter at Lloyd's. The vessel left Rotterdam for Sunderland pro-

¹ The words within brackets were inserted in the plea during the argument, at the suggestion of the Court.

perly ballasted and equipped on the 15th of May, and arrived on the 19th of May opposite a point called Seaham, which was about four miles from the port of Sunderland. On arriving there, and having a pilot on board, the master commenced heaving part of his ballast overboard, as was proved to be usual on such occasions. Whilst this was going on, the vessel drifted to the northward, and a strong squall coming on, the vessel drifted to the south-east, the ship was upset on her broadside, and her masts lay on the water. Every endeavour was made to right her, but in vain. She afterwards sank off Ryhope, drifted on shore, and became a total wreck. If the crew had not removed the ballast, the ship would most likely have stood the squall. It was objected at the trial that this was not a risk which the underwriter had undertaken to indemnify against. The learned judge was of opinion that the word "wilful" in the plea meant that the ballast was knowingly thrown overboard, and in a negligent manner, but said he would reserve that question for the opinion of the Court. And his lordship left two questions to the jury: first, was it negligent conduct to throw the ballast overboard before arriving in harbour?—secondly, did they think the master exercised a reasonable discretion in throwing overboard? They found, as to the first question, that they did think it negligent generally to throw over the ballast;—secondly, that the master did right, supposing the practice itself authorized him. A verdict was thereupon entered for the defendant on the second issue, the learned judge giving the plaintiff liberty to move to enter a verdict on that issue, if the Court should be of opinion that his construction of the meaning of the word "wilful," as used in the plea, was incorrect.

Alexander having, in Easter term last, obtained a rule to enter a verdict accordingly, or for judgment *non obstante veredicto*,—

Cresswell and *S. Temple* showed cause.—The second plea is a good answer to the action, as showing that the vessel was rendered unseaworthy by the act of the master and crew. It must be admitted that there have been cases which show that where a vessel sails in a seaworthy state, but becomes unseaworthy afterwards, the policy attaches, and the assurers are liable; but that law only applies to particular voyages, not to the case of a time policy like the present. It could not apply to a case where the master might set sail again without proper hands or ballast. No office would insure if that were the law. The owner must not cause the vessel

to be put out of repair. [*Maule*, B.—What the assured undertakes is, that the vessel shall be seaworthy at the commencement of the voyage.] The case of *Law v. Hollingsworth* (7 T. R. 160) decides that it is not enough that a ship sails on a voyage in a seaworthy state; for that voyage she must continue so. There the pilot was dismissed in the port of London, and the vessel after entering it was lost in the Thames; and it was held that the plaintiff could not recover against the underwriter. On the same principle, the assured is prohibited from doing any act that may do harm to the vessel and render her unseaworthy. Suppose a fresh supply of anchors and cables were not obtained in order to make up for articles of that description worn out, would the underwriters be liable? In *Phillips v. Headlam* (2 B. & Ad. 380), where the underwriters were held liable, the captain had made a signal for a pilot, and used due diligence to get one. That was not a case where the loss arose from the negligence of the master. *Clifford v. Hunter* (Moo. & M. 103) shows that the owners are bound to equip the ship with everything necessary for the voyage; and the ship having sailed in a seaworthy condition, they are bound to keep her so. In *Phillips v. Headlam*, *Parke*, J., says, "The assured is bound to have the vessel seaworthy at the commencement of the risk. He is bound therefore to have a sufficient crew, and a master of competent skill and ability to navigate her at the commencement of the voyage; and if she sails from a port where there is an establishment of pilots, and the nature of the navigation requires one, the master must take a pilot on board. So, if in the course of her voyage the master arrive in a port or place where a pilot is necessary, and take one on board, he ought not to dismiss him before the necessity has ceased." Lord *Kenyon*, C. J., says, in *Law v. Hollingsworth*, "The assured cannot recover on a policy of insurance unless they equip the ship with everything necessary to her navigation during the voyage: the ship herself must be seaworthy, she must have a sufficient crew, and a captain and pilot of competent skill. I do not feel that I am bound in this case to decide whether or not it be necessary that there should be on board the vessel a pilot, qualified according to the Act of Parliament referred to." This was not mere negligence; it was an act proceeding from the volition of the captain. In *Busk v. Royal Exchange Company* (2 B. & Ald. 73), the underwriters were held liable for a loss by fire occasioned by the negligence of the master and mariners. As far as the master was concerned, the ship there was seaworthy; it was a case of mere

negligence by absenting himself from the ship for a few hours. The throwing over the ballast is not a risk incident to a marine adventure. This was not a mere want of skill, but a voluntary proceeding on the part of the master, to avoid the inconvenience of sending out the ballast in a lighter. It is admitted that mere negligence might not discharge the underwriters; but this was done from volition on the part of the captain, a deliberate exercise of his own will, whereby a loss was occasioned. The word "wilful" does not necessarily mean barratrous. A barratrous throwing overboard means a throwing overboard with a particular object in view. [Parke, B.—The rule is, that a loss by barratry must be so described.] Yes; if the parties mean to charge barratry, they must so plead it. [It was then suggested by the Court, that in order to avoid this difficulty it would be well to insert in the plea the words "not barratrous," which was accordingly done (see *ante*, p. 101).] They further cited *Hollingsworth v. Brodrick*, 7 Ad. & E. 40; 2 N. & P. 608. There is an implied contract to keep the ship in a seaworthy state, which extends to every portion of the voyage.

Alexander and W. H. Watson, contra.—The question is, whether this plea is a good answer to the action, and whether the underwriters are discharged in consequence of the negligence of the master and crew. It is submitted that they are not, but that they remain liable notwithstanding. There is no distinction by reason of this being a time policy and not a policy on a particular voyage. Had it been a voyage policy, the owner would clearly be entitled to recover, and would not be affected by the conduct of the master and the crew; and there can be no distinction in principle between the one case and the other. The cases establish distinctly that the owner is not prejudiced by the conduct of the captain and the crew. In *Busk v. Royal Exchange Assurance Company*, where, in an action on a policy on ship, by which, among other risks, the underwriters insured against fires and barratry of the master and crew, they were held liable for a loss by fire occasioned by the negligence of the master and mariners; and it was also held that where the assured had once provided a sufficient crew, the negligent absence of all the crew at the time of the loss was no breach of the implied warranty that the ship should be properly manned. That case is identical with the present; the only difference being that the one was negligence in not taking proper care of the fire; the other, misconduct in throwing over the ballast.

That decision was much relied on in *Walker v. Maitland* (5 B. & Ald. 171), where it was held that the underwriters on a policy of insurance are liable for a loss arising immediately from a peril of the sea, but remotely from the negligence of the master and mariners. There *Abbott*, C. J., says, "I cannot distinguish this case from that of *Busk v. Royal Exchange Assurance Company*; there the immediate cause of the loss was fire, produced by the negligence of one of the crew; yet the underwriters were held to be liable. Here the winds and waves caused the loss; but they would not have produced that effect unless there had been neglect on the part of the crew." And *Holroyd*, J., says, "The underwriters engage to be responsible for the barratry of the master; they therefore engage to be responsible for the highest species of misconduct. This case cannot be put on the ground of the breach of the implied warranty to provide a master and a crew of competent skill. It is sufficient if the owners provide a master and crew generally competent; there is no implied warranty that such a crew shall not be guilty of negligence." So, in *Bishop v. Pentland* (7 B. & C. 219; 1 Man. & R. 49), where the vessel was stranded through having an insufficient rope, it was held that the underwriters were liable, although the stranding was occasioned remotely through the negligence of the crew, in not providing a rope of sufficient strength to fasten the vessel to the shore. *Fletcher v. Inglis* (2 B. & Ald. 315), which was the case of a time policy, was cited, but no such distinction was attempted to be taken as in the present case. *Holroyd*, J., there says, "It seems to me that in this case there was a stranding within the meaning of the policy. It is clearly established that if there be an actual stranding, although it arise from the negligence of the master and crew, the underwriters are liable. So in *Shore v. Bentall*, cited in a note to *Holdsworth v. Wise* (7 B. & C. 798; 1 Man. & Ry. 11), Lord *Tenterden* said, "We are all of opinion that underwriters are responsible for the misconduct or negligence of the captain and crew; but the owner, as a condition precedent, is bound to provide a crew of competent skill." The case of *Law v. Hollingsworth* has been relied upon, but that stands on a different footing from the present case. It is an implied condition that the owner shall have a pilot on board whenever necessary, the same as a competent captain and crew. It is very doubtful on what ground the judgment in that case proceeded. In *Busk v. The Royal Exchange Assurance Company* it was put by counsel that it proceeded on the ground that the

ship had not on board the pilot required by the Pilot Act; and that view is adopted by *Bayley, J.*, in giving his judgment in that case (p. 83); it is so treated in *Abbott on Shipping*, 148, and by Lord *Tenterden* and *Parke, J.*, in giving judgment in *Phillips v. Headlam. Hollingsworth v. Brodrick* (7 Ad. & Ell. 40; 2 Nev. & P. 608) does not apply. [*Alderson, B.*—That was a case where the unseaworthiness was not known to the party; how can that apply to a case where it is the act of the party knowing and wilfully doing the act, even though the word “wilful” is now to be taken in an innocent sense?] In that case, however, the Court disclaimed any distinction between a time policy and any other. In *Eden v. Parkinson* (Doug. 732), Lord *Mansfield* says, “By an implied warranty every ship insured must be tight, staunch, and strong, but it is sufficient if she is so at the time of sailing. She may cease to be so in twenty-four hours after her departure, and yet the underwriters will continue liable.” *Bermon v. Woodbridge* (ib. 780), is to the same effect. In *Park on Insurance*, 99, it is said, “In the construction of Policies of Insurance for time, which are very frequent, the same liberality, equity, and good sense have always prevailed as in all other insurances.” *Hucks v. Thornton* (Holt’s N. P. C. 30) is another authority that there is no distinction between a time and a voyage policy. It is sufficient in either case that the ship shall be seaworthy at the commencement of the voyage. [*Alderson, B.*—What do you call the commencement of the voyage—sailing from the port?] Yes; sailing from the port. It was so held in *Graham v. Barras*, 5 B. & Ad. 1011; 2 N. & M. 125. A ship may be seaworthy for the harbour and not for the voyage. The ballasting being a matter in the conduct of the master, it is within his discretion; and the underwriters are not discharged by the manner in which he may exercise it.

The judgment of the Court was now delivered by

PARKE, B.—In this case the defendant, to a declaration upon a time policy for six months, stating a loss by perils of the seas, pleaded three pleas, on each of which issue was joined. On the first and third, the verdict was found for the plaintiff; on the second, for the defendant. This plea stated, “that, though the vessel was lost by perils of the sea, yet that such loss was occasioned wholly by the wilful, wrongful, negligent, and improper conduct of the master and mariners of the ship; by wilfully, wrongfully, negligently, and improperly throwing overboard so much of the bal-

last that the vessel became unseaworthy, and was lost by the perils of the sea, which otherwise she would have safely encountered and overcome." On a motion for a judgment *non obstante veredicto*, it occurred to the Court to be questionable whether the plea was not at all events bad, inasmuch as the terms of it did not exclude the case of a loss by barratry, for which the underwriters would be clearly liable, and that on this declaration, and, as the fact certainly was, that the crew were not guilty of barratry, it was very properly agreed that the plea should be amended by inserting the words "but not barratrously" after the words "negligently and improperly." And the plea therefore in its present shape raises the question whether the underwriters are liable for the wilful but not barratrous act of the master and crew, in rendering the vessel unseaworthy before the end of the voyage, by casting overboard a part of the ballast. The case was very fully and ably argued, during the course of the last and present term, before my brothers *Alderson*, *Gurney*, *Maule*, and myself. We have considered it, and are of opinion that the plea is bad in substance, and that the plaintiff is entitled to judgment, notwithstanding the verdict.

The question depends altogether upon the nature of the implied warranty as to seaworthiness or mode of navigation, between the assured and the underwriter, on a time policy. In the case of an insurance for a *certain voyage*, it is clearly established that there is an implied warranty that the vessel shall be seaworthy, by which is meant that she shall be in a fit state as to repairs, equipment, and crew, and in all other respects, to encounter the ordinary perils of the voyage insured, at the time of sailing upon it. If the assurance attaches before the voyage commences, it is enough that the state of the ship be commensurate to the then risk.¹ And, if the voyage be such as to require a different complement of men, or state of equipment, in different parts of it, as, if it were a voyage down a canal or river, and thence across to the open sea, it would be enough if the vessel were, at the commencement of each stage of the navigation, properly manned and equipped for it. But the assured makes no warranty to the underwriters that the vessel shall *continue* seaworthy, or that the master or crew shall do their duty during the voyage; and their negligence or misconduct is no defence to an action on the policy, where the loss has been immediately occasioned by the perils insured against. This principle is now clearly esta-

¹ *Annen v. Woodman*, 3 Taunt. 30; *Hibbert v. Martin*, Park on Insurance, vol. i. p. 299, a, 6th ed.

blished by the cases of *Busk v. Royal Exchange Company*, 2 B. & Ald. 72; *Walker v. Maitland*, 5 B. & Ald. 171; *Holdsworth v. Wise*, 7 B. & C. 791; *Bishop v. Portland*, id. 219; and *Shore v. Bentall*, id. 798, *n.*; nor can any distinction be made between the omission by the master and crew to do an act which ought to be done, or the doing an act which ought not, in the course of the navigation. It matters not whether fire which causes a loss be lighted improperly, or, after being properly lighted, be negligently attended; whether the loss of an anchor, which renders the ship unseaworthy, be attributable to the omission to take proper care of it, or to the improper act of shipping it, or cutting it away; nor could it make any difference whether any other part of the equipment were lost by mere neglect, or thrown away or destroyed in the exercise of an improper discretion, by those on board. If there be any fault in the crew, whether of omission or commission, the assured is not to be responsible for its consequences.

The only case which appears to be at variance with this principle is that of *Law v. Hollingsworth*, in which the fact of the pilot who had been taken on board for the navigation of the river Thames, having quitted the vessel before he ought (under what circumstances is not distinctly stated), appears to have been held to vitiate the insurance. In this respect, we cannot help thinking that the case, although attempts were made to distinguish it in some of the decided cases, must be considered as having been overruled by the modern authorities above referred to; and that the absence, from any cause to which the owner was not privy, of the master or any part of the crew, or of the pilot, who may be considered as a temporary master, after they had been on board, must be on the same footing as the absence, from a similar cause, of any part of the necessary stores or equipments originally put on board. The great principle established by the more recent decisions, is, that, *if the vessel, crew, and equipments be originally sufficient, the assured has done all that he contracted to do, and is not responsible for the subsequent deficiency occasioned by any neglect or misconduct of the master or crew*; and this principle prevents many more and difficult inquiries, and causes a more complete indemnity to the assured, which is the object of the contract of insurance.

If the case, then, were that of a policy for a particular voyage, there would be no question as to the insufficiency of the plea; and the only remaining point is, whether the circumstance of this being a *time policy* makes a difference. There are not any cases in

which the obligation of the assured in such a case, as to the seaworthiness or navigation of the vessel, is settled; but it may be safely laid down, that it is not more extensive than in the case of an ordinary policy, and that, if there is no contract as to the conduct of the crew in the one case, there is none in the other. Here it is clear that no objection arises on the ground of seaworthiness of the vessel until that unseaworthiness was caused by throwing overboard a part of the ballast, by the improper act of the master and crew; and as the assured is not responsible for such improper act, we are of opinion that the plea is bad in substance, and the plaintiff entitled to our judgment.

Rule absolute to enter judgment for the plaintiff, *non obstante veredicto*.

The cases of *Woolridge v. Boydell* and *Dixon v. Sadler* are printed together because they are generally cited as the leading authorities, when the question arises whether any of the warranties which the law implies when policies of maritime insurance have been effected, have or not been broken.

With regard to *express* warranties, the most usual of which relate to the time of sailing; the safety of the ship at a particular time; her departure with convoy; the neutrality of the property insured; and freedom from liability to be incurred by a seizure in port; it is not intended here to say anything: the reader is referred to the various text-books on the subject. See 1 Arn. on Marine Insurance, 625, 2nd ed.; Smith's Mercantile Law, 372, 6th ed.

The warranties usually implied in policies of insurance, and which it is proposed to examine in this note are: 1. Not to deviate. 2. Sea-

worthiness. 3. That the ship shall be properly documented.

1. *As to the implied Warranty not to deviate.*—Where a vessel is insured from one place to another, the law implies a warranty on the part of the insured that the vessel shall pursue the regular and usual course from the *terminus à quo* to the *terminus ad quem*. A departure from it, usually termed a deviation, as it *alters* the nature of the risk, will at once discharge the underwriter from all liability.

The same principle is applicable to other cases where the risk is changed, and the underwriter will consequently be freed from his liability. Thus "if a ship insured for trade is turned into a factory ship, or a floating warehouse, the risk is different; it varies the stay, for while she is used as a warehouse no cargo is bought for her." Per Lord *Mansfield*, C. J., 3 Doug. 40; and as to the effect of voluntary delay ope-

rating as a deviation, see *Smith v. Surridge*, 4 Esp. 26; *Williams v. Shee*, 3 Campb. 469; *Samuel v. Royal Exchange Company*, 8 B. & Cr. 119; *Mount v. Larkins*, 8 Bingh. 108; *Freeman v. Taylor*, 8 Bingh. 124; *Palmer v. Marshall*, 8 Bingh. 79.

It is not material, in order to constitute a deviation, to show that the risk has been increased, it is sufficient to show that it has been varied. *Hartley v. Buggin*, 3 Doug. 39, 40. And if once a deviation has been made, the underwriter will be discharged from liability for all subsequent loss, even although the vessel may have returned safely after the deviation to the direct course of the voyage, and although the loss may not be in the slightest degree the consequence of the deviation. See *Elliot v. Wilson*, 4 Bro. P. C. 470, Toml. ed.; *Olason v. Simmonds*, 6 T. R. 533, cited.

The assured however may recover for a loss which has taken place *before* the deviation. *Green v. Young*, 2 Salk. 444; *Hare v. Travis*, 7 B. & C. 14.

A deviation, though unintentional, if it be made through the ignorance of the captain, will avoid the policy. *Phyn v. Royal Exchange Assurance Company*, 7 T. R. 505, cited.

A mere *intention* to deviate will not discharge the underwriter; in order to have that effect, the deviation must be actual. Suppose, for instance, a vessel leaves a port with the intention of touching at a place out of her course, but is lost

before she arrives at the deviating point, the assured can recover on his policy. *Kewley v. Ryan*, 2 H. Black, 343; *Thellusson v. Ferguson*, 1 Doug. 360.

In *Kingston v. Phelps*, cited 7 T. R. 165, the vessel was insured from Cork to London. The captain sailed with the intention of touching at Weymouth in his way, but before he had actually deviated for that purpose, a violent storm arose, and he was ultimately driven into the very port of Weymouth. Lord *Kenyon* held that the underwriter was bound, notwithstanding the intention to deviate, inasmuch as the actual deviation arose ultimately from inevitable necessity, and not from choice.

The principal case, of *Woolridge v. Boydell*, shows the distinction which undoubtedly exists between the effect of a mere intention to deviate, and a *change or abandonment of the voyage*; for in the latter case, if there has been a definite intention of changing the *terminus ad quem*, the underwriter will not be liable on the policy, even if a loss should have occurred before the vessel has reached the dividing point between the course mentioned in the policy, and the new course, though, as we have before seen, in the case of a mere intention to deviate, the result would be otherwise. See also *Way v. Modigliani*, 2 T. R. 30, 32.

There is often much difficulty in deciding whether there has been a determination to abandon the voyage or merely an intention to deviate. It may however be laid down

as a general rule that if the *terminus ad quom* is not *definitely* altered, the mere intention of putting into any other port or taking an intermediate voyage, will not amount to a change of voyage. *Heselton v. Allnutt*, 1 Maule & S. 46; *Driscoll Passmore*, 1 Bos. & P. 200. See also *Hall v. Brown*, 2 Dow, P. C. 367.

A vessel will be considered to have abandoned her course; if she undertake a distinct voyage, not subordinate to, or connected with, the voyage contemplated by the parties as the principal object of the contract. *Bottomley v. Bovill*, 5 B. & C. 210; and see *Hamilton v. Sheddon*, 3 Mees. & W. 49; and even when a ship is insured "at and from" a particular port to another, if a determination is finally formed by the owners of the ship, or parties duly authorized by them, to proceed to a different port from that mentioned in the policy, the underwriters will be discharged even if a loss has occurred before the vessel sailed from the port where the risk was to commence. See *Tasker v. Cunninghame*, 1 Bligh, P. C. 87.

The mere fact of taking in goods, and clearing out for a different port from that mentioned in the policy, will not be sufficient evidence of an abandonment of the original voyage, for it may have been the intention only to touch at that port and then proceed upon the voyage contemplated, in which case it would amount merely to evidence of an intention to deviate. See *Kewley v. Ryan*, 2 H. Black. 343;

Henkle v. Royal Exchange Assurance Company, 1 Ves. 817; *Planché v. Fletcher*, Dougl. 251.

Although a vessel is insured merely from one port to another, if by the usage of trade it is customary to stop at an intermediate port, the ship, although nothing is said upon the subject in the policy, may go to such intermediate port, without vitiating the policy. Thus, for instance, when a vessel was insured "at and from Stockholm to New York," it was held that it might touch at *Elseneur*, for convoy, and to pay the Sound dues, that being the regular course of vessels upon such a voyage. *Cormack v. Gladstone*, 11 East, 347.

As to the custom to make intermediate voyages in the East Indian and Newfoundland trades, see *Salvador v. Hopkins*, 3 Burr. 1707; *Gregory v. Christie*, 3 Doug. 419; *Vallance v. Dewar*, 1 Campb. 503; *Ougier v. Jennings*, ib. 505 n.; but the usage must be clear, precise, and established, otherwise a stoppage at an intermediate port will be considered a deviation. *Salisbury v. Townson*, Park. Ins. 647, 8th ed.

Where the policy gives liberty to touch at any intermediate port, it will be a deviation to touch at any other intermediate port, even although it be customary to call there. *Elliot v. Wilson*, 4 Bro. P. C. 470, Toml. ed.

As to the order in which intermediate ports should be visited, see *Clason v. Simmonds*, 6 T. R. 533; *Beatson v. Haworth*, 6 T. R. 531; *Marsden v. Reid*, 3 East, 572;

Gairdner v. Senhouse, 3 Taunt. 16; *Mellish v. Andrews*, 2 Maule & Sel. 27; S. C. 5 Taunt. 496; *Bragg v. Anderson*, 4 Taunt. 229; *Lambert v. Liddard*, 5 Taunt. 480; *Ashley v. Pratt*, 16 Mees. & Wels. 471; 1 Exch. 257.

As to the construction of the clauses giving a liberty "to touch," "to call," to "touch and stay," or "to touch, stay, and trade," and so forth, in cases of deviation, see *Lavabre v. Wilson*, 1 Doug. 286; *Metcalfe v. Parry*, 4 Campb. 124; *Urchhart v. Barnard*, 1 Taunt. 454; *Hogg v. Horner*, Park. 626, 8th ed.; *Ranken v. Reeve*, ib. 627; *Gairdner v. Senhouse*, 3 Taunt. 16; *Violet v. Allnutt*, ib. 419; *Rucker v. Allnutt*, 15 East, 278; *Bragg v. Anderson*, 4 Taunt. 229; *Mellish v. Andrews*, 2 M. & S. 27; 5 Taunt. 496, 16 East, 312; *Barclay v. Stirling*, 5 M. & Sel. 6; *Armet v. Innes*, 4 J. B. Moore, 150; *Hunter v. Leathley*, 10 B. & C. 858; S. C. 7 Bing. 517; 5 Moore & P. 457; 1 C. & J. 423; S. C. Ll. & Wels. 244; *Williams v. Shee*, 3 Campb. 469; *Hammond v. Reid*, 4 B. & Ald. 72; *Solly v. Whitmore*, 5 B. & Ald. 45; *Bottomley v. Bovill*, 5 B. & C. 210; *Hamilton v. Sheddon*, 3 Mees. & W. 49; *Stitt v. Wardell*, 1 Esp. 610; *Sheriff v. Potts*, 5 Esp. 96; *Laroche v. Oswin*, 12 East, 131; *Raine v. Bell*, 9 East, 195; *Cormack v. Gladstone*, 11 East, 347; *Inglis v. Vaux*, 3 Campb. 437; *Warre v. Miller*, 7 Dow & B. 1; 4 B. & C. 538; 1 Car. & P. 237; *Ashley v. Pratt*, 16 Mees. & W. 471, 1 Exch. 257.

If the parties describe in the policy the course to be taken in

the usual terms, both knowing that the vessel has already deviated therefrom, the deviation, it seems, will nevertheless be fatal. Thus in *Redman v. Lowdon*, 5 Taunt. 462, the owner of a vessel bound from London to Berbice, which had deviated by taking in goods at Madeira, insured her, with notice to the underwriter of the circumstances, "at and from London to Berbice," and inserted the words "at sea" in another part of the policy. It was held by the Court of Common Pleas that the assured could not recover on the policy. "If," said *Gibbs*, C. J., "the plaintiff meant to insure only from the ship's leaving Madeira, he should have shaped his contract accordingly, and have insured from a certain latitude to Berbice; or, if he meant to include the risk of average loss in the previous part of the voyage, he might have expressed it to be an insurance from London to Berbice, notwithstanding the previous deviation; but since the parties have made the policy in its present form of an insurance on a voyage at and from London to Berbice, the legal requisites of a voyage at and from London to Berbice must be performed in this case, as in any other." S. C. 1 Marsh. 186; 3 Campb. 503. See however and consider *Coles v. Marine Insurance Company*, 3 Washington's Circ. Court Rep. 159.

2. *What will justify a Deviation from the usual course.*—If a vessel departs from the usual course of the voyage from neces-

sity, and departs no further than that necessity requires, the voyage will still be protected by the policy (per *Kent, C.*, in *Robinson v. Marine Insurance Company*, 2 Johnson's Rep. 89); but if the ship insured do not pursue the voyage of necessity in the shortest and most expeditious manner, the underwriter will be discharged. *Lavabre v. Wilson*, Dougl. 284, 289, 290.

It has been held that where a ship has been carried out of her course by a ship of the Royal Navy (*Scott v. Thompson*, 1 Bos. & Pull. N. R. 181), or the captain has been compelled to take the vessel out of her course by the mutinous demand of the crew, to which he had no alternative but to submit (*Elton v. Brogden*, 2 Stra. 1264; *Driscoll v. Bovil*, 1 Bos. & Pull. 313), it will not amount to such a deviation as will discharge the underwriters.

But nothing short of necessity will justify deviation. Thus, in *Phelps v. Auldjo*, 2 Camp. 350, where the master of a merchantman, while taking in his loading at Iceland, was ordered by the captain of a king's ship to go out to sea to examine a strange sail discovered in the offing, bearing enemy's colours, and the master, without remonstrating and without any force or threats being employed to influence his determination, obeyed the orders of the captain, and finding the strange sail to be neutral, returned to the port. It was held by Lord *Ellenborough, C. J.*, that the deviation was inexcusable, and consequently the policy of in-

surance was vacated, "Where," said his lordship, "is the *vis major*? The master is not proved to have acted under any duress or compulsion. If a degree of force was exercised towards him which either physically he could not resist, or morally as a good subject he ought not to have resisted, the deviation is justified. But if he chose to go out in the hope of making a prize, he could not thereby extend the risk of the underwriters. Suppose the ship had been captured when she went out upon this cruise, were the underwriters to bear the loss? The purpose might be laudable, and a compensation to the owners would probably have been made by Government; but when the ship engaged in this hostile adventure, the voyage insured was at an end."

Again, if a vessel goes out of her course in order to refit or obtain repairs (*Motteux v. London Assurance Company*, 1 Atk. 545), to get ballast (*Guibert v. Readshaw*, Park, 637), to unload part of her cargo (*Weir v. Aberdeen*, 2 B. & Ald. 320), to recruit a disabled crew or procure fresh hands (see 3 Esp. 258), the underwriter, if it were necessary or proper that such steps should be taken, will not be discharged. If however the vessel should stay in a port out of her course for a longer period than was absolutely necessary to enable her to proceed on her voyage (*Motteux v. London Assurance Company*, 1 Atk. 545), or if she was obliged to put into such port in consequence of her having been

inadequately equipped or manned in the first instance, the underwriter can take advantage of the deviation. (*Woolf v. Claggett*, 3 Esp. 257; *Forshaw v. Chabert*, 3 Brod. & Bing. 158; S. C. 6 J. B. Moore, 369.) But if a vessel be driven off her course by stress of weather, and the captain does all in his power to reach the port of destination (*Harrington v. Halkeld*, Park, 639, 8th ed.), or if after he has been driven out of his port he does all in his power to return, and failing to do so, proceeds to the *terminus ad quem* (*Delany v. Stoddart*, 1 T. R. 22), the policy will not be vitiated as for a deviation.

It seems that if a vessel is prevented from reaching a port to which she is insured, as, for instance, by an embargo being laid upon all vessels entering, or by the port being inaccessible on account of ice, if she goes as near to the port as she can, and waits with the intention of prosecuting her voyage as soon as she can do so with safety, the underwriters will remain liable; but if she abandons her voyage by returning home, they will be discharged. *Blackenhagen v. The London Assurance Company*, 1 Camp. 454, 456.

Where a captain on a voyage, delayed by adverse winds and danger, puts into a place of safety in his course, and sends ashore for provisions (although he transmits a letter at the same time), it will not amount to a deviation. *Thomas v. The Royal Exchange Assurance Company*, 1 Price, 195.

Again, a ship may go out of her course for the purpose of *bond fide* seeking convoy (*Gordon v. Morley*, 2 Stra. 1265; *Bond v. Gonsales*, 2 Salk. 445; *Bond v. Nutt*, Cowp. 601), and it is immaterial whether she be warranted to sail with convoy or not (*D'Aguilar v. Tobin*, Holt, N. P. 185; S. C. 2 Marsh. 265), and if a ship warranted to sail with convoy, after she has sailed with convoy, is driven back and sails without it, she will not be held to have made a deviation. *Laing v. Glover*, 5 Taunt. 49. It may however amount to a deviation if a ship instructed to call at a particular port for convoy, goes to another, even though it be nearer, for the risk of the underwriter is thereby varied. *Hesilton v. Allnutt*, 1 Mau. & Selw. 45, 50.

It seems that an underwriter would not be discharged by a captain going out of his course to succour a ship at sea in distress; for it is for the common advantage of all persons, underwriters and others, to give and receive assistance to and from each other in distress. See *Lawrence v. Sydebotham*, 6 East, 54, 55; *The Beaver*, 3 C. Rob. Adm. Rep. 294; *The Jane*, 2 Hagg. Adm. Rep. 345.

If a departure from the course of the voyage be rendered necessary by the exercise of an overpowering force, although it be not of a character insured against, it will not be such a deviation as to discharge the underwriter. Thus, in *Scott v. Thompson*, 1 Bos. & P. N. R. 181, a policy was effected on goods on board a ship "at and from Liverpool

to Amsterdam, *against sea-risk and fire only.*" In the course of the voyage to Amsterdam she was boarded by a vessel of the Royal Navy and carried into Falmouth, where she was detained for some days. Upon being released, she proceeded towards Amsterdam, and on her voyage the goods insured sustained a sea-damage. It was held by the Court of Common Pleas that the underwriters were liable for the loss. "Nothing is more clear," said Sir J. Mansfield, C. J., "than the general principle that a deviation never puts an end to the insurance, unless it be the voluntary act of those who have the management of the ship. Here the state of the case excludes the idea of the deviation (as the going to Falmouth has been called) having been voluntary. The ship was carried there by force, and without any consent of those who had the management of the ship. Deviation occasioned by force and deviation occasioned by necessity are the same; for necessity is force. It is no matter whether it be the want of repair, or any other immediate danger, which renders the deviation necessary. When the deviation is necessary and unavoidable, it has no effect on the obligation of the insurer. . . . Considering this case, therefore, and the other cases which have been decided, I do not find anything like a real distinction between the present insurance and the ordinary insurance, including all the risks which are inserted in the policies in general." See however and con-

sider *O'Reilly v. Gonne*, 4 Campb. 249; *O'Reilly v. Royal Exchange Assurance Company*, ib. 246.

3. *As to the implied Warranty of Seaworthiness.*—In the case of an insurance for a certain voyage, or as it is generally termed a *voyage-policy*, there is, as is laid down in the principal case of *Dixon v. Sadler*, an implied warranty that the vessel shall be seaworthy, by which is meant that she shall be in a fit state as to repairs, equipment, and crew, and in all other respects, to encounter the ordinary perils of the voyage insured, at the time of sailing upon it, *ante*, p. 107. See also *Douglas v. Scougall*, 4 Dow, 276; *Wilkie v. Geddes*, 3 Dow, 60. If a vessel be not so seaworthy, from whatever cause it may arise, and though no fraud was intended on the part of the assured (*Wedderburn v. Bell*, 1 Campb. 1), and even although the owner of the ship may have had her surveyed and, as he may have thought, fully repaired, the underwriter will not be liable. *Douglas v. Scougall*, 4 Dow, 276; *Lee v. Beach*, Park, 468, 8th ed.

The warranty of seaworthiness will be implied whether the insurance be effected by the owner of the vessel or the owner of the goods carried by her. *Lee v. Beach*, Park, 468, 8th ed.; *Oliver v. Cowley*, ib. 470.

The degree of seaworthiness of a vessel implied by the law, must be such as to fit her for going through the various risks to which she may be subjected in different stages either of her voyage, or before un-

dertaking it, if she be then insured. This is well laid down by *Parke, B.*, in the principal case of *Dixon v. Sadler*, who observes, that "if the assurance attaches before the voyage commences, it is enough that the state of the ship be commensurate to the then risk, and if the voyage be such as to require a different complement of men, or state of equipment in different parts of it, as if it were a voyage down a canal or river, and thence across to the open sea, it would be enough if the vessel were, at the commencement of each stage of the navigation, properly manned and equipped for it." P. 107, *ante*. Take, for instance, the case of a policy on a ship "at and from London on a whaling voyage to the north, the warranty is for four gradations; that the vessel is fit for dock in London; fit for river to Gravesend; fit for sea to Shetland; and then fit for whaling." Per *Erle, J.*, 6 Ell. & Bl. 181. See also *Annen v. Woodman*, 3 Taunt. 299.

It seems that though a vessel at the outset of her voyage be by mistake or accident unseaworthy, if it be owing to some defect which is immediately discovered, and remedied before any loss happens in consequence of it, the policy will not be void, and the underwriters will remain liable. See *Weir v. Aberdeen*, 2 B. & Ald. 320; there a vessel, insured at and from London to Bahia, sailed on her voyage in an unseaworthy state in consequence of her having a greater cargo than she could safely carry. The master put into Ramsgate harbour, and there, with

the consent of the underwriters stated in a memorandum on the policy, discharged part of the cargo. The vessel afterwards left Ramsgate on her voyage, being then properly laden and in a seaworthy state. It was held by the Court of King's Bench that the underwriters were liable for a subsequent loss not in any degree attributable to the circumstance of her being overladen between London and Ramsgate.

The implied warranty will be satisfied if the vessel be seaworthy when she originally sails on her voyage, nor is it necessary that she should be seaworthy upon sailing on her voyage homeward or from any intermediate port. Thus, in *Bermon v. Woodbridge*, Doug. 781, a vessel was insured "at and from Honfleur to the coast of Angola, during her stay and trade there, at and from thence to her port or ports of discharge in St. Domingo and at and from St. Domingo back to Honfleur." The vessel was seaworthy when she first started on her voyage. Lord *Mansfield, C. J.*, said, "By an implied warranty, every ship must be seaworthy when she *first sails* on the voyage insured, but she need not continue so throughout the voyage; so that if this is one entire voyage, if the ship was seaworthy when she left Honfleur, the underwriters would have been liable, though she had not been so at Angola, etc." See also *Holdsworth v. Wise*, 7 Barn. & Cr. 794; *Redman v. Wilson*, 14 Mees. & W. 476.

It may here be mentioned, that

as between a shipowner and the owner of cargo, if a chartered vessel is seaworthy at the commencement of the voyage, but is afterwards damaged by the perils of the sea, though the owner is not bound to repair the vessel, yet if he elects not to do so, he ought not to proceed with the vessel in an unseaworthy condition, and a loss of cargo in consequence of his doing so will be a good cause of action. *Worms v. Storey*, 11 Exch. 427.

If the master or crew are originally competent, their subsequent negligence or misconduct is no defence to an action on the policy. See *Busk v. Royal Exchange Company*, 2 B. & Ald. 72; *Walker v. Maitland*, 5 B. & Ald. 171; *Hollingsworth v. Wise*, 7 Barn. & Cr. 794; *Bishop v. Pentland*, ib. 219; *Shore v. Bentall*, ib. 798 n.; *Redman v. Wilson*, 14 Mees. & W. 476; *Philips v. Nairne*, 4 C. B. 343. The principal case of *Dixon v. Sadler*, 5 Mees. & W. 405; affirmed in error, 8 Mees. & W. 895.

The case of *Law v. Hollingsworth*, 7 T. R. 160 (although, as we shall hereafter see, it has been supposed to have been decided upon other grounds), is contrary to these authorities. The facts were shortly as follows: a vessel was insured from Stetten to London; the captain took a pilot on board at Orfordness, but allowed him to quit the vessel at Halfway Reach; after which and before she had come to her moorings higher up the river, the accident happened which occasioned the loss. It was held by the Court of King's Bench that the under-

writers were not liable, inasmuch as the ship was not seaworthy at the time of the loss for the want of a pilot, owing to the neglect of duty on the part of the captain.

When the principal case of *Sadler v. Dixon* was heard upon appeal and affirmed in the Exchequer Chamber, *Tindal*, C. J., in delivering the judgment of the Court with reference to the case of *Law v. Hollingsworth*, said, "The ground of decision in that case appears to have been, that there was no pilot on board during the time the ship was sailing up the river Thames, which was required by the statute 5 Geo. II., and that it was an implied contract on the part of the assured that there should be such person. This at least appears to be the ground of Lord *Kenyon's* judgment, although certainly the other two judges seem to have considered that it was a loss arising from an act of gross negligence. The decision of that case may be maintainable, on the ground of an implied warranty to observe the positive requisitions of an Act of Parliament; but if it is to be taken as an authority, that the implied warranty on the part of the assured extends to acts of negligence on the part of the master and crew, throughout the voyage, we think it cannot be supported against the weight of the later authorities." 8 Mees. & W. 900.

In fact, as is laid down in the principal case of *Dixon v. Sadler*, "The great principle established by the more recent decisions, is, that if the vessel, crew, and equipments

be *originally* sufficient, the assured has done all that he contracted to do, and is not responsible for the subsequent deficiency occasioned by any neglect or misconduct of the master or crew." *Ante*, p. 108.

It may here be mentioned, that there is an implied condition or warranty of seaworthiness in a voyage-policy of insurance on salvage. Thus where the interest of salvors in a ship and cargo were insured on a voyage from Terceira to a final port of discharge in the United Kingdom, by a policy containing these words, "The vessel having been abandoned by her original crew and taken into Terceira by the salvors, in whose interest the said insurance was effected." It was held by the Court of Exchequer that the policy was liable to an implied condition of seaworthiness. *Knill v. Hooper*, 2 Hurlst. & Norm. 277.

The law however does not imply any warranty of seaworthiness from the relation of shipowner and seaman. Thus in *Couch v. Steel*, 3 Ell. & Bl. 402, being an action by a seaman against the shipowner, it was alleged in the first count that the plaintiff engaged with the defendant to serve on board the defendant's (a British) vessel as a common seaman, on a specified voyage from and to a British port. The breach alleged was that the vessel was leaky and unseaworthy, by which the plaintiff became unwell and sustained damage. It was held by the Court of Queen's Bench, on demurrer, that the count was bad, there being no allegation

of knowledge or deceit nor of any express warranty that the vessel was seaworthy. "The plaintiff," said *Coleridge, J.*, "must rely on a general principle, that in all such cases there is an implied contract that the vessel is seaworthy. I think it enough to say that we are now giving judgment in the year 1853, and that no such action as this has ever been maintained, though, if there were such a contract implied, there must have been numerous instances in which the facts would have supported such an action. The only authority relied on were the *dicta* in *Gibson v. Small* (4 H. L. Cas. 370, 404); but these were used with reference to the law of marine insurance; and that is a branch of the law having no analogy to that of the law of contract between shipowner and sailor. There are many doctrines which prevail in that contract, *uberrima fidei*, between insurer and assured, which have no place in any other branch of the law. This is in truth a contract between master and servant, and is to be decided on the principles applicable to that relation."

We have heretofore confined our attention to *voyage-policies* in cases of unseaworthiness; with regard to *time-policies*, the important case of *Gibson v. Small*, 4 H. L. Cas. 353, has decided that by the law of England there is no implied warranty, when a time-policy has been effected on a vessel *then at sea*, that she should be seaworthy when the policy was intended to attach. This does not in any way overrule anything laid down by the

learned Judge who delivered the judgment in the principal case of *Dixon v. Sadler*; on the contrary, the judgment of the Court of Exchequer expressly states the point to be unsettled, and it decided merely that the implied warranty was at least not more extensive than that in a policy on a voyage; and that, if there was no contract for the conduct of the crew in one case, there was none in the other. See 16 Q. B. 154. In *Gibson v. Small*, 4 H. L. Cas. 358, a policy of insurance was effected in London, on the 27th of November, 1843, on a ship then abroad, "lost or not lost, in port or at sea, in all trades and services whatsoever and wheresoever, during the space of twelve calendar months, commencing on the 25th day of September, 1843, and ending on the 24th day of September, in the year 1844, both days included." It was held by the House of Lords (affirming the decision of the Court of Exchequer Chamber, reported 16 Q. B. 141, reversing the judgment of the Court of Queen's Bench), that there was no implied condition that the ship should be seaworthy on the day when the policy was intended to attach. "With regard to *voyage-policies*," said Lord Campbell, C. J., "we have usage and authority establishing the implied condition as certainly as any point of insurance-law. These being wanting as to the extension of the doctrine to *time-policies*, the reasoning must be, that as far as this condition is concerned, the contract by *time-policies* rests on the same

principles, and that no distinction can be made between them. The condition may have been implied in *voyage-policies*, from considering that probably both the contracting parties contemplated the state of the ship when the risk is to begin; that this state must be supposed to be known to the shipowner; that he has it in his power to put the ship into good repair before the voyage begins; that to prevent fraud, and to guard the safety of the crew and the cargo, this obligation ought to be cast upon him before he can be entitled to any indemnity in case of loss; and above all, that this implied condition in *voyage-policies* is essentially conducive to the object of marine insurance, by enabling the shipowner, on payment of an adequate premium, and acting with honesty and securing reasonable diligence, to be sure of full indemnity in case the ship should be lost or damaged during the voyage insured; but *time-policies* are usually effected when the ship is at a distance, the risk being very likely to commence when it is actually at sea. Under these circumstances, is it at all likely that either party would contract with reference to the actual state of the ship at that time with respect to repairs and equipments? The shipowner probably knows as little upon this subject as the underwriter. Any information which he has received tending to show that the ship is in extraordinary peril he is bound to disclose, or the insurance effected by him is void; but is it reasonable to suppose that

he enters into a warranty or submits to a condition which may avoid the policy with respect to a state of facts of which he can know nothing? We must further consider that this condition, in many cases, he may have no power to perform. Above all, if this condition was implied in time-policies, their object might often be defeated, and the shipowner, acting with all diligence and with the most perfect good faith, might altogether lose the indemnity for which he had bargained." See also *Michael v. Tredwin*, 17 C. B. 551.

* Extrajudicial but conflicting opinions were also given in *Gibson v. Small*, both by the judges and the peers, as to the question whether, in certain other cases, a warranty of seaworthiness might not be implied in time-policies; as, for instance, where a ship is about to sail from a given port on a voyage, or from the commencement of every voyage undertaken during the time for which the insurance is effected. And Lord *St. Leonards* expressed his opinion clearly to be, that "if a ship were about to sail upon a particular voyage, and a time-policy was effected instead of a policy on the intended voyage, a condition would be implied that the ship was seaworthy at the commencement of the voyage." 4 H. L. Cas. 417. Lord *Campbell* however agreed with those of the judges who thought that in a time-policy "*there is no implied condition whatever as to seaworthiness.*" "I never for a moment," said his lordship, "could concur in the notion that there was an implied warranty that the ship

was seaworthy when it sailed on the voyage during which the policy attached. To lay down such a rule would, I think, be a very arbitrary and capricious proceeding, and being wholly unsanctioned by usage or by judicial authority, would be legislating instead of declaring the law. I likewise think that it would be very inexpedient legislation, as constant disputes would arise in construing the rule; for in fishing adventures, and where ships are employed for years in trading in distant regions from port to port (the instances in which time-policies are chiefly resorted to), there would be infinite difficulty in determining what was the commencement of the voyage during which the policy attaches. There would be a similar difficulty as to the *terminus ad quem*, in considering what the voyage truly is for which the ship must be fit. I have hesitated more upon the question whether, when a time-policy is effected upon an outward-bound ship lying in a British port where the owner resides, a condition of seaworthiness is to be implied. This might be an exception from the general rule, that in time-policies there is no implied warranty of seaworthiness, and it is free from some strong objections to the condition of seaworthiness being implied where the risk is to commence abroad. But in addition to the objection that as yet there has been no instance of an implied condition of seaworthiness in any time-policy, and that the general rule is against such a condition, this would be a gratuitous and judge-made exception to

the rule. I think it more expedient that the rule should remain without any exception, and, as at present advised, I should decide against the implied condition in all cases of time-policies. There is a broad distinction which may always be observed between time-policies and voyage-policies; but when you come to subdivide time-policies into such where the ship is in a British port and where the ship is abroad, and still more, if the residence of the shipowner is to be inquired into and regarded, there would be a great danger of confusion being occasioned by the attempted classification. It is most desirable that in commercial transactions there should be plain rules to go by, without qualification or exception. Marine insurance has been found most beneficial, as hitherto regulated, and I am afraid of injuring it by new refinements. I should be glad therefore, that it should be understood, according to my present impression of the law, *that there is in all voyage-policies, but that there is not in any time-policies framed in the usual terms, a condition of seaworthiness implied.* This rule, I believe, is adapted to the great bulk of the transactions of navigation and commerce, and when any case occurs to which it is not adapted, this may be easily provided for by express stipulation." 4 H. L. Cas. 422.

The opinion expressed by Lord Campbell in the House of Lords has been followed in the *Thompson v. Hopper*, 6 Ell. & Bl. 172; and *Fawcus v. Sarsfield*, 6 Ell. & Bl. 202, in the Queen's Bench, Erle, J., dis-

sentiente; and see *Jenkins v. Heycock*, 8 Moore, P. C. C. 351.

Where however a vessel insured by a time-policy is sent to sea in a state not fit for the particular voyage, and, without encountering any more than ordinary risk, is obliged, owing to the defective state in which she sailed, to put into port for repair, the shipowner, though the defects were not known to him, and he has acted without fraud, cannot recover against the underwriters the expenses of such repairs as were rendered necessary in consequence of the unseaworthy state of the vessel, though there was no warranty of seaworthiness. *Fawcus v. Sarsfield*, 6 Ell. & Bl. 192.

Where in the case of a time-policy a declaration alleged loss by perils of the sea, it was held by the Court of Queen's Bench that a good defence was shown by a plea alleging that the plaintiff knowingly, wilfully, wrongfully, and improperly sent the ship to sea at a time when it was dangerous to go to sea in the state and condition in which she then was; and wrongfully and improperly caused and permitted the ship to be and remain on the high seas near to the seashore, for a great length of time, in the state and condition aforesaid, and without a master and without a proper crew to manage and navigate her on her said voyage; during which time the ship, *by reason of the premises*, was wrecked. *Thompson v. Hopper*, 6 Ell. & Bl. 172, 987; but this decision was reversed on appeal. 5 Jur. N. S. 93.

It is difficult to lay down what amounts to seaworthiness; it may perhaps be defined with sufficient

accuracy, by saying that the ship ought to be in such a state of repair and equipment as will render her suitable for the voyage she is about to undertake. A want of seaworthiness may arise, either, first, from defects in the vessel itself, or secondly, from the deficiency or incompetency of the master and crew.

A ship will be considered as unseaworthy not only when her hull (*Munro v. Vandam*, Park on Insurance, 469, 8th ed. ; *Parker v. Potts*, 3 Dow, 27; *Watt v. Morris*, 1 Dow, 32; *Douglas v. Scougall*, 4 Dow, 269), masts, or sails (*Wedderburn v. Bell*, 1 Campb. 1) are not such as are suitable for her destined voyage, that is to say, well furnished, tight, sound, and strong; but also when her ground-tackling is not sufficient to encounter the ordinary perils of the sea; and therefore when it appeared that the best bower-anchor was too light and the cable of the small bower-anchor wholly defective, it was held that the vessel was not seaworthy. *Wilkie v. Geddes*, 3 Dow, 57; see also *Harrison v. Douglas*, 3 Ad. & Ell. 396. So also the vessel will not be seaworthy if she have not sufficient stores and supplies, or even sufficient medicines for the voyage (*Woolf v. Claggett*, 3 Esp. 257; and see *Stewart v. Wilson*, 12 Mees. & W. 11), or if she be so heavily or so improperly laden as to be unable to encounter the voyage. *Weir v. Aberdeen*, 2 B. & Ald. 320.

The ship will not be considered seaworthy unless a master of reasonably competent skill is provided. Thus, in *Tait v. Levi*, 14 East, 481, a ship was insured at and from

Cork to the ship's loading port or ports on the coast of Spain, within the Straits of Gibraltar, including Tarragona, and not higher up the Mediterranean." The captain, through entire ignorance of the coast, went to Barcelona, an enemy's port, which is higher up than Tarragona. It was held by the Court of King's Bench that there was a failure of the implied warranty on the part of the assured, that a captain of competent skill and knowledge for the declared purpose of the voyage should be provided. "On my present view of the case," said *Le Blanc*, J., "there appears to me to have been an incompetent fitting out of the ship with a proper master for the purpose of the voyage insured. The ship was to be fitted out in an adequate manner to secure her from going higher up the Mediterranean than Tarragona, according to the express intention of the parties; the owners should therefore have put on board a captain of sufficient skill to distinguish the port of Tarragona from the neighbouring ports on the coast; and if, from his not knowing one port from another, he goes into an enemy's port instead of the port of Tarragona, which it was his duty to distinguish under this policy, there appears to me to be a want of sufficient skill in the captain and crew for the purpose of the voyage insured."

It has even been decided that a ship was not seaworthy when she had sailed on a voyage from Mauritius to England without a person on board able to do the duties of the captain, on his becoming so ill

as to be incompetent to continue in charge of the ship. *Clifford v. Hunter*, 1 Mood. & Malk. 108; S.C. 3 C. & P. 16.

The ship will not be seaworthy unless she is provided with a crew competent, in point of numbers and skill, to perform (*Shore v. Bentall*, 7 B. & Cres. 798) and engaged for (*Forshaw v. Chabert*, 3 Brod. & Bingham. 158) the whole voyage insured. The implied warranty will, as we shall elsewhere see, be satisfied if the crew be originally sufficient. See also and consider *Hucks v. Thornton*, Holt's N. P. Rep. 30.

If a ship sail from a port where there is an establishment of pilots, and the nature of the navigation requires one, the vessel will not be seaworthy unless the master take a pilot on board (see *Phillips v. Headlam*, 2 Barn. & Ad. 383); and according to the decision of *Law v. Hollingsworth*, 7 T. R. 160 (if it is still to be considered an authority, see *ante*, p. 117), if in the course of the voyage the master arrive in a port or place where a pilot is necessary, and take one on board, he ought not to dismiss him before the necessity has ceased.

But if a vessel sails to a port where the establishment is such that it is not always possible to procure the assistance of a pilot before the vessel enters into the difficult part of the navigation, then, as the law compels no one to perform impossibilities, all that it can reasonably require in such a case is, that the master use all reasonable efforts to obtain one. If such efforts are used and fail of

success, it is not material that in the exercise of his discretion in the navigation of the ship, in the absence of a pilot, the master afterwards commits an error by which a loss is incurred, any more than if he does so in any other part of the voyage, always supposing that he is a person of competent skill and ability. *Phillips v. Headlam*, 2 B. & Ad. 380, 384.

Ordinarily the proof of want of seaworthiness falls upon the underwriter, inasmuch as *prima facie* a ship will be deemed seaworthy (*Parker v. Potts*, 3 Dow, 31, per Lord Eldon, C.); but where the inability of the ship to perform the voyage becomes evident in a short time from the commencement of the risk, the presumption is that it was from causes existing before her setting sail on her intended voyage, and that the ship was not then seaworthy; and the *onus probandi* in such a case rests with the assured, to show that the inability arose from causes subsequent to the commencement of the voyage. Per Eldon, C., in *Watson v. Clark*, 1 Dow, Rep. 336; and see *Munro v. Vandam*, Park on Ins. 469, 8th ed.; *Parker v. Potts*, 3 Dow, 23; *Douglas v. Scougall*, 4 Dow, 269.

Seaworthiness is a question peculiarly for the determination of a jury. *Foster v. Steele*, 3 Bing. N. C. 892; *Foster v. Alvez*, ib. 896. As to the best evidence to be given of seaworthiness, see *Thornton v. Royal Exchange Company*, Peake 25; *Beckwith v. Sydebotham*, 1 Camp. 116.

It may be here mentioned that the implied warranty of seaworthi-

ness may be dispensed with, by the underwriters admitting the seaworthiness of the vessel insured, as where the policy contains a clause by which the vessel was "allowed to be seaworthy for the voyage." *Parfitt v. Thompson*, 13 Mees. & W. 392; *Phillips v. Nairne*, 4 C. B. 843.

4. *Implied Warranty that the Ship shall be properly documented.*—Another implied warranty on the part of the owner of a ship insured, is that it shall be provided with those documents which either the general law of nations or treaties with particular nations require. Thus, in *Bell v. Carstairs*, 14 East, 375, a policy of insurance was effected by the plaintiffs, as agents for American citizens, on an American ship and her cargo, but no express warranty or representation was made that the ship or cargo were American. The Americans were then neutrals. The ship and cargo were captured by a French ship, and condemned in a French court as prize, upon the express ground, stated in the sentence of condemnation, that the ship was not properly documented according to the existing treaty between France and the United States of America. It was held by the Court of King's Bench that the neutrals assured could not recover their loss against the British underwriter, although there was no express warranty or representation that the ship was American. "If," said Lord *Ellenborough*, C. J., "the condemnation has been occasioned by any act or neglect on the part of the assured,

it would not be a loss against which the assured would, upon any principle of reason or justice, as applied to this species of contract, be required to indemnify him. The indemnity stipulated on his part being only against the perils described in the policy, as far as they operate upon the property insured adversely, and not through the medium of any act or neglect on the part of the assured himself, producing the loss of the property insured. . . . In a policy on ship (and this, whether there is a warranty or representation respecting the nation to which a ship belongs or not), as the shipowner is bound to have such documents as are required by treaties with particular nations on board, to evince his neutrality in respect of such nations; the want of them in the event of capture, and when the production of them becomes necessary, is most material."

Although where there is an *express* warranty of the ship's national character, the underwriters will be discharged if the ship be not properly documented at the time of sailing (*Rich v. Parker*, 7 T. R. 705), in the case of a mere implied warranty, the existence of the proper documents on board at the *commencement* of the voyage is immaterial, if they are produced at the time of capture. *Bell v. Carstairs*, 14 East, 393, 394.

In determining whether a ship has been condemned by a foreign court for want of proper papers, the Court will look into the alleged grounds of the foreign sentence as well as at the sentence itself (see

Bell v. Carstairs, 14 East, 374, 392, 394), and not, as in *Christie v. Secretan*, 8 T. R. 194, confine itself strictly to the sentence.

There is no implied warranty on the part of the owner of goods that a ship shall be properly documented (*Carruthers v. Gray*, 3 Camp. 142; 15 East, 35; *Dawson v. Atty*, 7 East, 367), for the owner of goods, it has been said, is not liable to suffer in respect of his insurance, on account of any defect in the documents belonging to the ship, with the procurement or existence of which he had no concern. Per Lord *Ellenborough*, C. J., in *Bell v. Carstairs*, 14 East, 394. A similar argument might be used against a warranty of seaworthiness being implied on the part of the owner of goods, but, as we have before seen, such implied warranty is fully established.

Where however the owner of the goods insured is also owner of the ship, the warranty will be implied, so as to discharge the underwriters from all loss on account of the goods, if the vessel be not properly documented. *Bell v. Carstairs*, 14 East, 374.

The implied warranty that a ship shall be properly documented, will be satisfied if the ship have on board such documents as are required, either by general international law, or by treaty between her own country and that of any other ship by which she may be captured. If therefore a ship has been condemned for a mere breach of a private ordinance of another country, the underwriters will not

be discharged. *Price v. Bell*, 1 East, 663; and see *Bell v. Bromfield*, 15 East, 368, per *Bayley*, J.

A register is not a document required by the law of nations as evidence of a ship's national character; unless therefore the possession of one can be shown to be required by some treaty between the country of the captured ship and of the captors, the underwriters will not be discharged from their liability. *Le Cheminant v. Allnutt*, 4 Taunt. 367.

When a ship carries simulated papers without the consent of the underwriters, the owner cannot recover from them upon a loss by capture (*Horney v. Lushington*, 15 East, 46; 3 Camp. 85; *Fomin v. Oswell*, 3 Camp. 357; 1 Mau. & Selw. 393), even though it appear, by the sentence of the foreign prize court, that one only of the causes stated for the condemnation was the carrying of the simulated papers. *Oswell v. Vigne*, 15 East, 70; see also *Steel v. Lacy*, 8 Taunt. 285.

Where however, by the terms of the policy, the assured has liberty to carry simulated papers, the underwriters will not be discharged from the loss, if the sentence of the condemnation of the ship appears to have been on account of her carrying simulated papers; or if that circumstance, mixed up with other considerations, operated in proportion at all as the ground of the condemnation. Per Lord *Ellenborough*, C. J., in *Bell v. Bromfield*, 15 East, 369.

ROUX v. SALVADOR.

In the Excheq. Chamber, Mich. Term, 7 Will. IV., Nov. 15, 1856.

[REPORTED 3 BINGH. N. C., 266.]

INSURANCE—TOTAL LOSS—ABANDONMENT.]—*Hides insured from Valparaiso to Bordeaux free of particular average, unless the ship were stranded, arriving at Rio Janeiro, on their way to Bordeaux, in a state of incipient putridity, occasioned by a leak in the ship, were sold for a fourth of their value at Rio, because by the process of putrefaction they would have been destroyed before they could have arrived at Bordeaux. The assured received the news of the damage to the hides and of their sale at the same time : Held, that the assured might recover as for a total loss without abandonment.*

Assumpsit on a policy of assurance, subscribed by the defendant for £200. Plea, *non-assumpsit*.

By a special verdict it was found in substance that the policy on which the action was brought was effected on goods per the 'General La Fayette,' and other ship or ships, at and from, among other ports or places in the Pacific ocean, Valparaiso, to any port or ports in France and the United Kingdom of Great Britain, with leave to touch and trade at any place in America or anywhere else, to effect all transshipments, and including the risk of craft to and from the vessel or vessels. The usual perils were insured against, and the policy, which was for £700, had the following memorandum subscribed :—" N.B. Corn, fish, salt, fruit, flour, and seed, are warranted free from average, unless general, or the ship be stranded. Sugar, tobacco, hemp, flax, hides, and skins are warranted free from average under five per cent.; and all other goods; also the ship and freight are warranted free from average, under three per cent., unless general, or the ship be stranded." The policy was declared to be upon goods, specie, or bullion, as interest might appear, to

pay average on each species of goods by following landing numbers of the value of £100 each, as if separately insured. Cocoa and hides free of particular average unless the ship were stranded : in cases of average on the hides the assurers were to pay the expense of washing and drying in full.

Under this policy the plaintiff, on the 6th of May, 1831, caused to be shipped on board the ship 'Roxalane,' at Valparaiso, for Bordeaux, in France, 1000 salted hides of the value of £1117, his property, which hides were intended to be insured by the said policy, and were duly declared thereupon, and a bill of lading duly signed by the captain in the ordinary form.

On the 13th of May, 1831, the said ship being seaworthy, with the said 1000 hides, and other hides on board thereof, set sail from Valparaiso aforesaid, on her said voyage towards Bordeaux. On the 5th of June, 1831, in the course of her said voyage, the said ship, with the said goods on board thereof, encountered bad weather, and sprung a leak ; and it thereby became necessary, for the safety of the ship and cargo, that the said ship should put into a port for repair ; and the said ship did accordingly put into Rio de Janeiro, in Brazil, being the nearest port for repair.

On the 7th of July, 1831, the whole of her cargo was there landed, and it was then found that the said hides were damaged by the said perils and dangers of the seas, as follows, that is to say, that they had been washed or wetted by the sea-water which had entered into the vessel through the said leak, and also by the effect of the dampness produced in the hold by the leak ; and in consequence thereof a partial fermentation ensued, the progress of which could not be stopped by any means practicable in Rio de Janeiro ; and in consequence of the progressive putrefaction of the said 1000 hides, *it was impossible to carry them, or any part thereof, in a saleable state to the termination of the voyage for which they were insured* : if it had been attempted to take them to Bordeaux, they would by reason of such progressive putrefaction as aforesaid, have altogether *lost the character of hides before they arrived there*. On the 27th of August, 1831, at Rio de Janeiro, the said 1000 hides in the said policy mentioned, according to the ordinances of the French consul-general there, were sold by public auction for the gross sum of £273 ; the same were bought by the purchasers for the purpose of being tanned, and were tanned accordingly. The ship 'Roxalana' being repaired and the leak stopped which was in her bottom, she, on the 3rd of October, 1831, sailed from Rio de

Janeiro without the said hides in the said policy mentioned, but with such part of her cargo reloaded on board as had not been sold; and in the course of her voyage from Rio de Janeiro to Bordeaux, was stranded at the entrance of the river Garonne, on the 29th of December, 1831. The earliest intelligence of the damage and of the sale of the said 1000 hides was received at the same time by Messrs. Devaux and Company, the agents for the said plaintiff, by a letter from Bordeaux.

The Court of Common Pleas, after two arguments, having given judgment for the defendant (see 1 New Cases, 526), the cause was removed by *error* into the Exchequer Chamber, where it was argued in Easter Vacation, 1836, by *Maule* for the plaintiff, and the *Attorney-General* for the defendant.

Maule for the plaintiff.

First, there has been such a stranding of the ship as to entitle the plaintiff to claim and recover an average loss. The condition in the policy must be taken strictly, and the insurer having consented to abide by it without qualification, it is immaterial whether the stranding was connected with the loss or not. Thus, in *Burnet v. Kensington* (see 7 T. R. 210), upon a similar condition, the ship having been stranded in the course of the voyage, the underwriters were held liable for an average loss arising from the perils of the seas, though no part of the loss arose from the act of stranding; and so strictly has such a condition been construed, that a loss occasioned by the stranding of a lighter in conveying goods from the ship has been held not to be a stranding of the ship within the meaning of the condition. *Hoffman v. Marshall*, 2 New Cases, 383.

Secondly, there was a total loss of such a nature as, whether actually or only constructively total, to render unnecessary a notice of abandonment.

Such notice was unnecessary, because notwithstanding a portion of the goods remained in an altered shape, upon the sale of them the adventure was at an end. The Court below, in deciding that notice of abandonment was necessary, relied mainly on *Mitchell v. Edie*, 1 T. R. 608; *Allwood v. Henckell*, Park, Ins. 280; and *Hodgson v. Blackiston*, Park, Ins. 281. In the two first of these cases the sale was not rendered necessary by perils insured against, and in neither of them was the state of circumstances before the sale such as to make the prosecution of the adventure impossible, and to amount to a total loss, independently of the assured choosing to treat it as

such ; consequently if there had been no sale, a notice of abandonment would clearly have been necessary. In the third of those cases it is not stated what was the nature of the loss ; the report only states that notice of abandonment was held necessary, though the ship and cargo had been sold and converted into money when the notice of the loss was received. It therefore only amounts to an authority that the sale of the ship and cargo does not of itself render unnecessary a notice of abandonment ; a proposition which is not denied by the plaintiff in this cause. The three cases are all of them consistent with the proposition contended for by the plaintiff, that where a loss is of itself total, independently of the election of the assured, that is, where the subject of the insurance is placed, by the peril insured against, in a situation which renders the prosecution of the adventure impossible, notice of abandonment is not necessary. The cases referred to only establish the proposition not inconsistent with the preceding, that where the perils insured against have reduced the subject of insurance to such a state as not to render the adventure impossible, but to give the assured a right, by notice of abandonment, to throw it upon the underwriters ; and when the loss therefore is only total at the election of the assured, and a notice of abandonment is necessary to show that he elects so to treat it, a sale will not excuse the want of such a notice. Those cases therefore are not authorities for the doctrine in support of which they are cited by the Court of Common Pleas, and the case of *Cambridge v. Anderton*, 2 B. & C. 691 ; 1 Car. & P. 215 (in which *Hodgson v. Blackiston* was cited), is directly in point in favour of the plaintiff. There the ship having got on rocks, and experienced persons giving it as their opinion that the expenses of getting off and repairing her would exceed her value when repaired, the captain sold her ; and it was held that the assured might recover for a total loss, without abandonment, notwithstanding the purchaser afterwards got her off and despatched her on a voyage to England. The Court below, however, relied on principle as well as on authorities, and the reasoning of the Court amounts to this : that an abandonment is necessary, because it would be convenient for the underwriter to have early notice of the intention of the assured to call upon him, in order that he may the better prepare his defence, or exercise the rights belonging to him as an underwriter with respect to the subject insured. This would apply to make a notice of abandonment necessary in all cases whatever of total loss, and an early notice of claim in all cases of partial loss ; and indeed to require a prompt notice in all cases, whether

arising out of contracts of insurance or not, where the defendant might be prejudiced by delay, an object which the Legislature must be taken to have provided for by the Statute of Limitations. The necessity of notice of abandonment however does not rest on this principle, but arises out of the election which the assured has in certain cases to treat the loss as an average loss and to carry out the adventure, or to throw the risk on the underwriters by notice of abandonment; and where the perils insured against have rendered such an election impossible, no notice of abandonment is necessary. In *Read v. Bonham*, 3 B. & B. 147, a notice of abandonment having been given, which the Court held sufficient, the plaintiff was not called upon to contend it was unnecessary; and in *Parry v. Aberdeen*, 9 B. & C. 411, the plaintiffs having heard of the destruction of the ship before they heard of the subsequent occurrences, were bound to abandon if they meant to claim for a total loss. On the other hand, in *Doyle v. Dallas*, 1 Moo. & Rob. 48, the want of notice of abandonment appears to have been thought immaterial; in *Robertson v. Clarke*, 1 Bing. 445, where the ship was sold, and a total loss recovered, there does not appear to have been any notice of abandonment; in *Mullett v. Shedden*, 13 East, 304, it is admitted that abandonment is not necessary where goods are sold by the Court of Admiralty; and in *Cologan v. London Assurance Company*, 5 M. & S. 447, *Abbott, J.*, says, "Abandonment excludes any presumption which might have arisen from the silence of the assured that they meant to adhere to the adventure." Here it is impossible to suppose the assured could mean to adhere to the adventure when he knew the result was ascertained by a sale of which he had received the proceeds.

Sir J. Campbell, Attorney-General, contra.—1st. There was no stranding for which the underwriter is liable. The stranding intended by the parties must be a stranding in the course of the adventure. A stranding before or after the adventure is wholly unconnected with it, and not within the meaning of the policy. Some limitation must be put on the time with respect to which the underwriter's liability is to attach, as the liability in respect of the goods commences with their being put on board; so it ceases on their being safely landed.

2ndly. This was not a total loss, for though the hides were damaged, they still existed as hides, were sold as such, and if tanned, might have been carried to Bordeaux. There would not have been

a total loss therefore, even if the goods had not been excepted by the memorandum; but being so excepted *a fortiori*, they could not be deemed totally lost so long as any of them remained *in specie* at the termination of the risk, when they were landed at Rio de Janeiro. The assured cannot by a premature sale throw on the underwriter a liability as for a total loss. In *Dyson v. Rowcroft*, 3 B. & P. 474, on which the Court of Common Pleas relied, there was an actual total loss by the article being thrown overboard; and *Manning v. Nunham*, 3 Dougl. 130; *Park, Ins.* 260; 2 Campb. 624 n., where the possibility of a salvage was held not to exonerate the underwriter, is much shaken by *Glennie v. London Assurance Company*, 2 M. & S. 371, where the underwriter was discharged, because the goods, although sold for less than their freight, might have been transmitted to their destination. In *Hunt v. Royal Exchange Assurance Company*, 5 M. & S. 47, it was held that a loss of voyage for the season by perils of the sea was not a ground of abandonment upon a policy of goods with a clause of warranty free from average, as where the cargo was in safety, and not of such a perishable nature as to make the loss of a voyage a loss of the commodity, although the ship were rendered incapable of proceeding on the voyage. In *Thompson v. Royal Exchange Assurance Company*, 16 East, 214, where the ship was wrecked, but the goods were brought on shore, though in a very damaged state, so that they became unprofitable to the insured, it was held that the underwriters on the goods, who were freed by the policy from particular average, could not be made liable as for a total loss by a notice of abandonment. And Lord *Ellenborough* said, "All the goods were got on shore and saved, though in a damaged state. If this can be converted into a total loss by notice of abandonment, the clause excepting underwriters from particular average may as well be struck out of the policy. We can only look to the time when the loss happened and the goods were landed; and then it was not a total loss, however unprofitable they might afterwards be." And that decision is confirmed by *M'Andrews v. Vaughan*, *Park, Ins.* 185. In *Anderson v. Wallis*, 2 M. & S. 240, copper and iron was insured from London to Quebec, warranted free from particular average; the ship was driven into Kinsale, and being detained for repairs, so that she could not proceed to Quebec that season, the iron, which was greatly damaged, and the copper were sold; but notwithstanding the ship had lost her voyage, the loss of the goods was held not to be total. So here, though the destined market

for the hides was lost, the hides remaining in specie, the loss was not total.

Lastly, in order to enable the assured to recover, an abandonment was necessary, and the cases relied upon in argument and by the Court below, to which may be added *Anderson v. Royal Exchange Company*, 7 East, 38, are not outweighed by *Cambridge v. Anderton* and *Mullett v. Shedden*,—the only conflicting decisions which bear upon the point. The authority of *Cambridge v. Anderton* is weakened by the language of Bayley, J., in *Gardner v. Salvador*, Moo. & Rob. 116; but in *Cambridge v. Anderton*, as well as in *Mullett v. Shedden*, abandonment was not necessary, because the loss was indisputably total. If according to *Mitchell v. Edie*, *Allwood v. Henckell*, and *Hodgson v. Blackiston*, a sale does not end the adventure so as to exonerate the assured from giving notice of abandonment, neither will the receipt of the money nor the intelligence of the sale coming at the same time as the intelligence of the loss: that does not carry the matter further than the sale. Here the money produced by the sale of the hides became vested in the assured; he has a right to keep it, and if he thought fit, to treat the loss as partial; and whenever the assured may treat a loss as partial, an abandonment is necessary to make it a total loss.

Maule was heard in reply; and with respect to *Hunt v. Royal Exchange Assurance Company*, *Thompson v. Royal Exchange Assurance Company*, and *Anderson v. Wallis*, observed that the goods were not of such a nature or damaged in such a way as to render it impossible, as in the present case, to forward them to their original destination.

Cur. adv. vult.

LORD ABINGER, C. B.—This was a writ of error upon the judgment of the Court of Common Pleas, in an action on a policy of insurance upon goods by the 'Roxalane' at and from any ports or places in South America to a port in France or in the United Kingdom, with various liberties not material to be mentioned. By a written memorandum at the foot of the policy, the insurance was declared to be on hides shipped at Valparaiso, *free of average, unless the ship should be stranded*, and in case of average loss the underwriters were to pay the expense of washing and drying in full. The declaration contains the usual averments, and states that the hides were shipped at Valparaiso, that the vessel set sail with them on board for Bordeaux, a port in France, and that in the course of the voyage the hides became lost by the perils of the sea, and never arrived at Bordeaux.

The plea is the general issue.

It appears by the record, that the cause was tried and a special verdict found, which after stating the facts necessary to support those parts of the declaration upon which no question arises, sets forth the loss in substance as follows :—" That the hides of the value of £1000 having been shipped in the vessel, she set sail on her voyage, in the progress of which she encountered perils of the sea and sprang a leak, in consequence of which she was compelled to put into Rio Janeiro, being the nearest port ; that her cargo was taken out and landed when it was found, as the fact was, that the hides were damaged by the perils of the sea, and by reason of their being wetted by the water issuing through the leak, and of the consequent dampness of the hold, they were undergoing a process of fermentation, which could not be checked ; and that, in consequence of their progressive putrefaction, it was impossible to carry them or any part of them in a saleable state to the termination of the voyage ; and that if it had been attempted to take them to Bordeaux, they would in consequence of the putrefaction have lost the character of hides before their arrival. The special verdict further states that the hides were in consequence sold at Rio Janeiro, by order of the French Consul there, for the sum of £270 ; that they were purchased to be tanned, and were afterwards tanned. That the ship being repaired, set sail for Bordeaux, and was stranded upon entering the Garonne ; and that the earliest intelligence of the damage and the sale were received at the same time in a letter from Bordeaux.

The judgment is entered for the defendant, to set aside which judgment this writ of error is brought. The stranding of the vessel upon entering the river Garonne, in her passage to Bordeaux, is introduced into the special verdict with a view to meet the supposed case of a partial loss ; and it has been contended, that the fact of stranding being a condition to let in the claim for a partial loss, it is not material whether the stranding takes place whilst the goods insured are on board or after they have been landed. We are not prepared to adopt that conclusion, but the view we take of this case renders it unnecessary to enter into any discussion of the argument or to pronounce any opinion upon it.

It appears from the report of the judgment of the Court of Common Pleas upon the case, that the learned Judges were of opinion that there was a constructive total loss in case it had been followed by an abandonment to the underwriters, and that their judgment for the defendant was grounded upon the want of such an aban-

donment. It has been urged before us in support of the judgment, first, that there was no total loss; secondly, that if there were any circumstances which might have amounted to more than an average or partial loss, they were not such as without an abandonment could have been converted into a total loss.

Upon the first point it has been contended, that even if these goods had not been excepted from average loss by the memorandum unless upon the condition of stranding, there would not in this case have been a total loss, and that *à fortiori* being goods so expressly excepted from average loss by the memorandum, they could not become totally lost so long as any part of them remained *in specie* at the termination of the risk; that the risk terminated when the goods were taken out at Rio de Janeiro, when they were so far from being destroyed by the perils of the sea that they were actually sold as hides and were capable of being tanned. It appears to us that there is no ground whatever for this assumed distinction between goods that are subject to a partial loss unconditionally and goods excepted by the memorandum from such loss. The interest which the assured may have in certain cases to convert a partial loss into a total loss, may be a fair argument to a jury upon a doubtful question of fact as to the nature of the loss or the motive for an abandonment, and in the same view that interest has been adverted to occasionally by Judges where the conclusions to be drawn were from facts upon a special case, or upon a motion for a new trial, were open to discussion. But there is neither authority nor principle for the distinction in point of law; whether a loss be total or partial in its nature must depend upon general principles. The memorandum does not vary the rules upon which the loss shall be partial or total; it does no more than preclude the indemnity for an ascertained partial loss, except on certain conditions. It has no application whatever to a total loss or to the principle on which a total loss is to be ascertained.

Dismissing this distinction then, the argument rests upon the position that if at the termination of the risk the goods remain *in specie*, however damaged, there is not a total loss. Now the position may be just, if by the "termination of the risk" is meant the arrival of the goods at their place of destination according to the terms of the policy. But there is a fallacy in applying these words to the termination of the adventure before that period by a peril of the sea. The object of the policy is to obtain an indemnity for any loss that the assured may sustain by the goods being pre-

vented by the perils of the sea from arriving in safety at the port of their destination. If by reason of the perils insured against, the goods do not so arrive, the risk may in one sense be said to have terminated at the moment when the goods are finally separated from the vessel, whether upon such an event the loss is total or partial no doubt depends upon circumstances. But the existence of the goods, or any part of them, *in specie*, is neither a conclusive nor in many cases a material circumstance to that question. If the goods are of an imperishable nature, if the assured become possessed or can have the control of them, if they have still an opportunity of sending them to their destination, the mere retardation of their arrival at their original port may be of no prejudice to them beyond the expense of reshipment in another vessel. In such a case the loss can be but a partial loss, and must be so deemed even though the assured should, for some real or supposed advantage to themselves, elect to sell the goods where they have been landed, instead of taking measures to transmit them to their original destination. But if the goods once damaged by the perils of the sea, and necessarily landed before the termination of the voyage, are by reason of that damage in such a state, though the species be not utterly destroyed, that they cannot with safety be reshipped into the same or any other vessel,—if it be certain that, before the termination of the original voyage, the species itself would disappear, and the goods assume a new form, losing all their original character,—if, though imperishable, they are in the hands of strangers not under the control of the assured,—if, by any circumstances over which he has no control, they can never or within no assignable period be brought to their original destination,—in any of these cases the circumstance of their existing in specie at *that forced termination* of the risk is of no importance. The loss is in its nature total to him who has no means of recovering his goods, whether his inability arises from their annihilation or from any other insuperable obstacle. Accordingly in the case of *Hunt and others v. The Royal Exchange Assurance* (5 M. & S. 47), which was cited by the Attorney-General in support of his argument, the judgment of Lord *Ellenborough* contains a very important passage, which distinguishes it from the present case. He says, “If indeed the cargo had been of a perishable nature, this would not have been a case of retardation only, but of destruction of the thing assured;” and further he says, “I cannot necessarily infer that the flour would be changed in quality and condition by the delay from November

to April, so as to incur any material damage operating a destruction of the thing insured." In the case of *Anderson v. Wallis* (2 M. & S. 240), which was also relied upon, the goods consisted of copper, which was wholly uninjured, and of iron, which was partially damaged. The assured by their own agent had possession of them, the ship was capable of repair, and might have prosecuted, and did, in four weeks after the accident, sail upon another voyage; the only pretence for a total loss was the retardation of the voyage, upon which ground, combined with the other circumstances, the Court held the loss not to be total. But it is clear from the judgment of the Court, that if by reason of the perils of the sea the goods could never have been sent to their destination, the loss would have been held to be total. In like manner it will be found in the other cases cited upon this part of the argument, that there has always existed one or more other circumstances in combination with that of the goods existing *in specie*, to induce the judgment that the loss was not total, as in *Glennie v. The Lond. Assur. Co.* (2 M. & S. 371). The rice had arrived at its port of destination, and though damaged was delivered to the consignees, and in a saleable state as rice. In *Thompson v. The Royal Exchange* (16 East, 214), the tobacco and sugar, though damaged by the perils of the sea, were in the hands of the owner at Heligoland, and, as stated by Lord *Ellenborough* in his judgment, might for anything that appeared have been forwarded to their port of destination. In *Anderson v. The Royal Exchange Assurance Company* (7 East, 38), the wheat was partly saved, was in the hands of the shipper at Waterford, was kiln-dried and might have been forwarded, as the rest of the cargo was after the same operation, to its port of destination; but the owner, after dealing with it for some time as his own, abandoned it too late, even if he ever had a right to abandon it at all. In the case before us the jury have found that the hides were so far damaged by the perils of the sea, that they never could have arrived in the form of hides. By the process of fermentation and putrefaction which had commenced, a total destruction of them before their arrival at the port of destination became as inevitable as if they had been cast into the sea or consumed by fire. Their destruction not being consummated at the time they were taken out of the vessel, they became in that state a salvage for the benefit of the party who was to sustain the loss, and were accordingly sold, and the facts of the loss and the sale were made known at the same time to the assured. Neither he nor the underwriters could at that time exercise any control over them, or

by any interference alter the consequences. It appears to us therefore that this was not the case of what has been called a *constructive* loss, but of an absolute total loss of the goods. They could never arrive, and at the same moment when the intelligence of the loss arrived all speculation was at an end. It has indeed been strenuously contended before us that the sale of the hides whilst they remained *in specie* rendered abandonment necessary to make the loss total; that the money produced at the sale became vested in the assured; that he had an undoubted right to keep it if he thought proper, and to treat the loss as partial; and that whenever it is in his power to treat the loss as partial, an abandonment is necessary to make it a total loss. The assured certainly has always an option to claim or not, but his abstaining from his right does not alter the nature of it; and if it be true that the proceeds of the sale vested in him, they would equally have done so if, instead of being sold *in specie*, the hides had actually changed their form and been sold as glue, or manure, or ashes. The argument therefore in effect resolves itself into this question, *whether when a total loss has taken place before the termination of the risk insured, with a salvage of some portion of the subject insured which has been converted into money, the insured is bound to abandon before he can recover for a total loss.* If any doubt should still exist upon this point, it is important that it should be well considered and determined.

The history of our own law furnishes few, if any illustrations of the subject of abandonment before the time of Lord *Manfield*. That great Judge was obliged to resort to the aid of foreign codes, and to the opinion of foreign jurists, for the rules and principles which he laid down in the leading cases of *Goss v. Withers* (2 Burr. 683) and *Hamilton v. Mendez* (1 W. Black. 276). But even those principles are, comparatively speaking, of modern date. The most ancient codes of the Law Maritime, when it was considered a part of the law of nations, contain no chapter upon assurances, neither do the earliest municipal codes, nor the earliest treatises upon assurances make any mention of abandonment; when a policy of assurance was considered in the nature of a wager without reference to any actual interest possessed by the assured, it was needless to treat of abandonment. The code of Florence, which bears date 1523, contains no allusion to that topic. The decisions of the rota of Genoa, at the time when that state was most eminent for its naval power and commercial enterprise, have been preserved by Straccha. Amongst them are found many cases of insurance upon

sea risks ; not one of them turns upon any question of abandonment, or contains any allusion to that subject. The same author has written a very elaborate treatise upon assurances, but is equally silent upon the subject of abandonment. He has also preserved in that treatise the form of a policy bearing date at Ancona, October 20th, 1567, which he says was at that time in general use amongst the states of Italy. From the terms of that policy it is difficult to infer any right or duty of abandonment. It contains this clause : " Et si delle mercantie assecurate intervenisse o fosse intervenuto alcun disastro, li assicuratorij debbono dare et pagare quelli danari assecurati al detto assecurato fra mesi due dal dì che in Ancona ne fosse vera nuova. Et si pretendessero per ragione alcuna dire in contrario, non possono esser uditi da corte, giudice, o magistrato alcuno, si prima non averanno pagati effectualmente danari contanti." So that not only two months after the credible news of any disaster was the underwriter bound to pay a total loss, but if he meant to contest the claim, he was within that time to purchase the right of litigation by first paying the sum insured. It was however to be restored to him in the event of his success. There is also a clause in the policy by which if there was no account of the ship for twelve months, the underwriter was bound to pay at the end of that time, subject to restitution if the ship should afterwards arrive,—a provision wholly inconsistent with any notion of abandonment. The same law probably prevailed at that period throughout the states of Italy. But when assurances came to be considered as contracts of indemnity and not as mere wagers, it became necessary to make some rules for the conduct of the parties where the loss was partial, as well as to secure to the assured, when it was total, the full measure of his indemnity and no more. The obligation of abandonment was the necessary consequence of confining the object of the contract to a strict indemnity. Accordingly we find in the chapter of assurances in the civil statutes of Genoa in 1610, the disaster upon which the underwriter is bound to pay is limited and defined to be the incapacity of the ship to proceed within a month after she has been disabled, or the detention of her by force and the compulsory dereliction of her voyage, whereby she is forced to land the goods insured. In those cases the assured may either abandon the goods and demand the full insurance, or make up the amount of the loss and demand it from the underwriters, who, if it amount to fifty per cent., shall have their option either to pay that sum and leave the goods to the as-

sured or to pay the whole and take the goods. By the same law wager policies are prohibited and declared void. Here it is obvious that the object of the law was to limit the claim of the assured to a strict indemnity. The same principle will be found in various codes of the other maritime states of Europe in which abandonment is mentioned, though it must be admitted that the rules they have respectively adopted are very different. In some abandonment is merely permissive and limited to very few cases. In others, as in the codes of Rotterdam and Amsterdam, abandonment was imperative, even in the case of an absolute total loss. Such seems to have been the law of France as established by the ordinances of Louis XIV in 1681. From the words of that code indeed it might be thought that they were only intended to prohibit it in all but the specified cases, and not to enforce it as a preliminary condition for recovering an absolute total loss: "Ne pourra le délaissement être fait qu'en cas de prise, naufrage, bris, échouement, arrêt de prince, ou perte entière des effets assurés: et tous autres dommages ne seront réputés qu'avariés." Emerigon, in his 'Treatise des Assurances,' c. 17, s. 1, remarks that abandonment presents to the mind the idea of a thing existing in whole or in part, or at least the idea of a doubtful existence, for it appears absurd to announce to the assurers a thing of which the absolute loss is already established. Nevertheless he says, "According to our Maritime Laws one may abandon to the underwriter a thing entirely lost, and, however singular it may appear, the law requires the form of an abandonment in the process of an *action de délaissement*, though it be stated that the goods have absolutely ceased to exist;" this apparent inconsistency in the law of France is now removed by the code Napoleon. Under the title *du Délaissement* in the *Code de Commerce*, there are seven cases enumerated in which abandonment is permitted, amongst which the "perte entière des effets assurés" is not to be found. There is indeed a power given to abandon in case the loss or damage of the goods insured amount to three-fourths, but the necessity of making an abandonment in case of the entire loss seems to be guarded against expressly by the article 372, which provides "that the abandonment shall extend to nothing but those effects which are the object of the assurance and the risk."

But whatever lights might have been heretofore derived from foreign codes and jurists, the practice of insurance in England has been so extensive and the questions arising upon every branch of it

have been so thoroughly considered and settled, that we need not now look beyond the authorities of the English law to illustrate the principle on which the doctrine of abandonment rests, and the consequences which result from it. It is indeed satisfactory to know, that however the laws of foreign states upon this subject may vary from each other, or from our own, they are all directed to the common object of making the contract of insurance a contract of indemnity and nothing more. Upon that principle is founded the whole doctrine of abandonment in our law; the underwriter engages that the object of the assurance shall arrive in safety at its destined termination. If in the progress of the voyage it becomes totally destroyed or annihilated, or if it be placed by reason of the perils against which he insures in such a position that it is wholly out of the power of the assured or of the underwriter to procure its arrival, he is bound by the very letter of his contract to pay the sum insured. But there are intermediate cases,—there may be a capture, which, though *prima facie* a total loss, may be followed by a recapture, which would re-vest the property in the assured. There may be a forcible detention which may speedily terminate, or may last so long as to end in the impossibility of bringing the ship or the goods to their destination. There may be some other peril which renders the ship unnavigable, without any reasonable hope of repair, or by which the goods are partly lost, or so damaged that they are not worth the expense of bringing them or what remains of them to their destination. In all these or any similar cases, if a prudent man not insured would decline any further expense in prosecuting an adventure the termination of which will probably never be successfully accomplished, a party insured may, for his own benefit as well as that of the underwriter, treat the case as one of total loss, and demand the full sum insured. But if he elects to do this, as the thing insured or a portion of it still exists, and is vested in him, the very principle of the indemnity requires that he should make a cession of all his right to the recovery of it, and that too within a reasonable time after he receives the intelligence of the accident, that the underwriter may be entitled to all the benefit of what may still be of any value; and that he may, if he pleases, take measures at his own cost for realizing or increasing that value. In all these cases not only the thing assured or part of it is supposed to exist *in specie*, but there is a possibility, however remote, of its arriving at its destination, or at least of its value being in some way affected by the measures that may be adopted for the re-

covery or preservation of it. If the assured prefers the chance of any advantage that may result to him beyond the value insured, he is at liberty to do so; but then he must also abide the risk of the arrival of the thing insured in such a state as to entitle him to no more than a partial loss. If, in the event, the loss should become absolute, the underwriter is not the less liable upon his contract, because the insured has used his own exertions to preserve the thing assured, or has postponed his claim till that event of a total loss has become certain which was uncertain before. In the language of Lord *Ellenborough*, in the case of *Mellish v. Andrews* (15 East, 13), "it is an established and familiar rule of insurance, that when the thing insured subsists *in specie*, and there is a chance of its recovery, there must be an abandonment. A party is not in any case obliged to abandon, neither will the want of an abandonment oust him of his claim for that which is in fact an average or total loss, as the case may be." Again in *Mullett v. Shedden* (13 East, 304), the same learned Judge says, "If, instead of the saltpetre having been taken out of the ship and sold, and the property divested, and the subject-matter lost to the owner, it had remained on board the ship and been restored at last to the owner, I should have thought there was much in the argument, that in order to make it a total loss, there should have been notice of abandonment, and that such notice should have been given sooner; but here the property itself was totally lost to the owner, and the necessity of any abandonment was altogether done away." In that case, the sentence under which the sale was made had been reversed, and the proceeds directed to be paid to the owner. So that there was a substitution of money for a portion at least of the matter insured. Both these cases are direct authority that no abandonment is necessary where there is a total loss of the subject-matter insured. To which may be added the cases of *Green v. The Royal Exchange Assurance Company* (6 Taunt. 68), *Idle v. The Royal Exchange Assurance Company* (8 Taunt. 755), *Robertson v. Clarke* (1 Bingham. 445), *Cambridge v. Anderton* (2 B. & C. 697); this last is in all points similar to the present, and is an express decision that, when the subject-matter insured has, by a peril of the sea, lost its form and species,—where a ship, for example, has become a wreck or a mere congeries of planks, and has been *bonâ fide* sold in that state for a sum of money,—the assured may recover a total loss without any abandonment. In fact, when such a sale takes place, and in the opinion of the jury is justified by necessity and a due regard to

the interests of all parties, it is made for the benefit of the party who is to sustain the loss; and if there be an insurance, the net amount of the sale, after deducting the charges, becomes money had and received to the use of the underwriter, upon the payment by him of the total loss. It may be proper to mention, however, that the assured may preclude himself from recovering a total loss, if, by any view to his own interest, he voluntarily does or permits to be done any act whereby the interests of the underwriter may be prejudiced in the recovery of that money. Suppose, for example, that the money received upon the sale should be greater than or equal to the sum insured, if the assured allows it to remain in the hands of his agent, or of the party making the sale, and treats it as his own, he must take upon himself the consequence of any subsequent loss that may arise of that money, and cannot throw upon the underwriter a peril of that nature. This is the true principle of the case of *Mitchell v. Edie* (1 T. R. 608), which was cited as an authority for the decision of the Court of Common Pleas. There the insurance was upon sugar from Jamaica to London. The ship had been captured by a privateer, deprived of some of her crew and a portion of her stores, then released, and carried by the remainder of the crew into Charleston, where she arrived on the 18th of February, 1782. The report does not state when the intelligence of this event arrived in London, but it is probable that it must have reached the assured before the month of June following. One of the owners of the ship was resident at Charleston; he took possession of her, and, instead of despatching her on the original voyage, he sold the cargo of sugar in the month of June, and sent the ship on another voyage. He had been connected with the assured in former adventures. He retained the money in his hands, and came to England in June, 1783. The assured pressed him for payment of the money, but took no steps to recover it; he became insolvent the following year; no claim was made upon the underwriters till after this event, and then, after the expiration of three years from the alleged loss of the goods, notice of abandonment was given, and the action brought; upon which the defendant paid into Court a sum sufficient to cover a general average, and pleaded the general issue. The Court gave judgment against the plaintiff; stating that he had abandoned too late. And it cannot be disputed, that if he ever had any colour for claiming a total loss, it must have been upon an abandonment before he heard of the sale, as he afterwards gave credit to his agent for the

money, and elected to treat it as his own, till the event of an insolvency, which prevented the underwriter from recovering it. But in fact there never was a total loss by a peril of the sea. The sugars were safe at Charleston, and the sale by the owner of the ship was not a loss by a peril insured against. The secret of the conduct of the assured may be discovered by a reference to the dates and the circumstances of the time. During the war with America, and especially towards the close of it, the intercourse between that country and the West India Islands was much interrupted, and the price of colonial produce was higher in Charleston than in London. It was therefore probably his interest to give up his claim upon the underwriters, and adopt the sale. If therefore the sale of the goods could have been treated as a loss, the conduct of the assured had either deprived him of the right to claim it, or made him liable, if he had the right, to account to the underwriters for the amount of the sale. If indeed the Court must be supposed to have treated the sale at Charleston as a loss, for which the underwriter was at any time responsible, the case may be an authority for establishing the principle, that even when a total loss has occurred, by a sale of the goods, the assured may, by his own conduct in electing to take the proceeds instead of making his claim upon the underwriter, if he thereby alters the position of the facts so as to affect the interest of the underwriter, forfeit his claim to recover a total loss. But the case is in no view an authority for the judgment of the Court of Common Pleas, which for these reasons we think ought to be reversed; and a verdict entered for the plaintiff for £27. 15s. 6d. and 40s. costs.

Judgment for plaintiff.

"The history of the Law of Abandonment, both in our own and foreign countries," writes a late very eminent author, "will be found learnedly discussed in the judgment of Lord Abinger, in the great case of *Roux v. Salvador*." Smith's *Mercantile Law*, 392, 8th ed.

The doctrine of abandonment

comes into question where there has been a total loss of property comprised in a contract of maritime insurance.

A *total loss* is of two kinds, absolute or constructive.

Where the loss is absolute, that is to say "where the subject insured becomes totally destroyed or

annihilated, or if it is wholly out of the power of the assured or of the underwriter to procure its arrival," the assured is entitled by the very letter of his contract to immediate payment of the sum insured without his giving any notice of abandonment of the property insured to the underwriter.

Where however a constructive total loss takes place, that is say, where the subject of the insurance is not wholly destroyed, but is placed in such peril as to render the successful prosecution of the adventure improbable, and such as a prudent man uninsured would decline any further expense in following up, in such case the insured may treat the case as a total loss, and demand the full sum insured. He must however give notice, within a reasonable time, to the insurer of his intention so to do, and of his abandonment to him of all his right to the thing insured.

The doctrine of abandonment, as observed by the Chief Baron in the principal case, is founded upon this principle, that the contract of insurance *is a contract of indemnity and nothing more*, and the very principle of indemnity requires that the insurer should make a cession of all his right to the recovery of the property insured, and that too within a reasonable time after he receives intelligence of the accident, that the underwriter may be entitled to all the benefit of what may still be of any value; and that he may, if he pleases, take measures at his own cost for re-

alizing or increasing that value. *Ante*, p. 140.

In examining the subject so well discussed in the principal case, it is proposed to consider:—1st. What amounts to absolute total loss, or loss in which notice of abandonment is not required. 2nd. What amounts to constructive total loss, in which notice of abandonment is requisite. 3rd. What is necessary to constitute a valid abandonment. 4th. The effects of abandonment on the rights and liabilities of the parties to the contract of insurance.

1. *Total absolute loss.*

As we have before observed, where there is a total absolute loss of the subject-matter insured, the insured may recover the whole sum for which the property lost was insured, without giving any notice whatever of abandonment. In fact, it would be an absurdity to require notice, when the very idea of a total loss supposes either the non-existence of the thing insured, or its existence in such a position or shape as to render its recovery hopeless.

There are two kinds of total absolute loss—as laid down by Lord Abinger, C.B., in the principal case: 1st, Where the subject of the insurance in the progress of the voyage becomes totally destroyed or annihilated; 2nd, Where it is placed by reason of the perils against which he insures, in such a position that it is wholly out of the power of the assured or of the underwriter to procure its arrival. In one or other of these classes we shall see that all cases of total absolute loss belong.

If a ship has foundered, or been burnt at sea (*Murray v. Hatch*, 6 Mass. Rep. 475), or has become a mere wreck so as to be broken in pieces and dismembered (*Bell v. Nixon*, Holt, N. P. 425; *Irving v. Manning*, 1 H. L. Cas. 817), it is clear that a total absolute loss has taken place. And not only where the ship is bodily and specifically lost or is a mere wreck, but under other circumstances also, although the ship may hold together, it may be considered that an absolute total loss has occurred; where, for instance, a ship is so shattered in a storm that upon survey it is found the expense of repairing her would exceed her original value (*Robertson v. Clarke*, 1 Bing. 445; *Robertson v. Caruthers*, 2 Stark. 571; *Cambridge v. Anderson*, Ry. & Mood. 60; 2 B. & C. 691); and *à fortiori* where, in the words of the Chief Baron in the principal case, the ship has become "a wreck or mere congeries of planks" (*ante*, p. 141), the owner may recover as for a total loss, although the vessel or her materials have been sold by the master, if he has done so in the exercise of a sound discretion, as a prudent owner uninsured would have done. Thus, in the leading case of *Cambridge v. Anderson* (Ry. & Mood. 60; 1 C. & P. 231; 4 Dowl. & Ry. 203), a vessel, the principal portion of whose cargo consisted of timber and insured from Quebec to Bristol, struck on a rugged shore two hundred fathoms from the land, and about two hundred and twenty miles from Quebec. Her captain

failing to get her off, upon the advice of an agent of Lloyd's, had the ship examined by three surveyors, who gave it as their opinion that she could not be repaired under a sum which would exceed her prime cost. Her captain, acting on their judgment, sold the ship with her register and her cargo. The purchasers were shipwrights, who did some repairs to her, and sent her on another voyage; in the prosecution of which she was lost. The captain and the mate and the ship's carpenter proved that they saw her after the repairs were done, and did not think her fit to undertake a voyage, and that they would not have trusted their lives in her. The plaintiff having given no notice of abandonment, brought an action against the underwriters to recover for a total loss, with benefit of salvage to the underwriters. It was argued for the defendant that the plaintiff could not recover as for a total loss, for the ship was not sold as a wreck to be broken up, but was sold *with her register*, to make another voyage, and that it was clear, from the circumstance of her having been purchased by shipwrights and repaired, that she must have existed as a ship; and that if a vessel existed in specie, and could by any repairs be made fit for sailing, it was not a total loss. Lord Tenterden, C. J., before whom the case was tried at Guildhall, said, "This is a question of considerable importance to ship-owners. If the jury are of opinion that this vessel could not be re-

paired at all, or that she *could not be repaired without incurring an expense equal to or greater than her value*, then I shall hold, that, although she may exist in the form of a vessel, and be afterwards sold with her register, the plaintiff will be entitled to recover as for a total loss, with benefit of salvage to the underwriters." (Ry. & Mood. 61.) The jury having found a verdict for a total loss, a motion was afterwards made for a new trial, but the rule was refused. Lord *Tenterden*, C. J., then said, "Whether the ship were repairable or not was left as a question to the jury, and I think that they disposed of it correctly. If the subject-matter of insurance remained a ship it was not a total loss, but if it were reduced to a mere congeries of planks the vessel was a mere wreck; the name which you may think fit to apply to it cannot alter the nature of the thing." *Bayley*, J., observed, "I take the legal principle to be this; if by means of any of the perils insured against, the ship ceases to retain that character, and becomes a wreck, that is a total loss, and the master may sell her, and the assured may recover for a total loss, without giving any notice of abandonment. This was decided in *Read v. Bonham* (3 B. & B. 147), and although *Richardson*, J., there differed from the rest of the Court, that was only upon the facts of the case, and not as to the legal principle upon which it was decided." 2 B. & C. 692. See also *Gardner v. Salvador*, 1 Mood. & Rob. 117; *Tanner v. Bennett*,

Ry. & Mood. 182; *Underwood v. Robertson*, 4 Campb. 138.

Where however the ship, although much damaged, remains all the time in the character of a ship, the owner cannot proceed to a sale (*Martin v. Crokatt*, 14 East, 465), or to break her up (*Bell v. Nixon*, Holt's N. P. 423), and afterwards recover for a total loss without giving notice of abandonment to the underwriters; for it is but just, that they should be enabled to elect whether or not they will incur the expenses of repair. *Martin v. Crokatt*, 14 East, 465, 467; *Fleming v. Smith*, 1 H. L. Cas. 513; *Knight v. Faith*, 15 Q. B. 659. As observed by Lord *Campbell*, C. J., in his able judgment in the case of *Knight v. Faith*, 15 Q. B. 659, "The condition of giving notice of abandonment in such a case is imposed by the law to give the insurers the means of inquiry and of guarding against fraud, to enable them to repair the ship if they should deem such a proceeding for their advantage, and to secure to them all the advantages to which, if liable for a total loss, they would be entitled as owners of the ship from the time when the damage was sustained to which the loss is ascribed." In another passage in his judgment, his Lordship shows the propriety of requiring notice of abandonment in such cases because "there is reason to apprehend that great frauds are committed in distant parts under pretence that ships insured have received an injury which renders it imprudent to repair them; and

such frauds would be much facilitated if the owners were not required to make any communication to the insurer till they came upon him peremptorily to demand payment of the full sum subscribed in the policy." *Ib.* 668.

If the master, by means within his reach, can make an experiment to save a ship with a fair hope of restoring it to the character of a ship, he cannot, by selling, turn it into a total loss. *Bona fides* in the master will not decide the question, for if he sells erroneously what is entitled to the character of a ship, though he thinks it a wreck, it will not do. Per *Bayley, J.*, in *Gardner v. Salvador*, 1 Mood. & Rob. 117. See also *Hodgson v. Blackiston*, Park on Ins. 400 n. 8th ed.; *Allwood v. Henckell*, *ib.* 399 n.

As a question may be raised whether, if a vessel reaches her port of destination, though in such a state as not to be worth while repairing, the assured can recover as for an *absolute total* loss, it would be advisable for him to give notice of abandonment to the insurers, for there is no doubt but that, under such circumstances, he would be able to recover as for a total loss. *Stewart v. Greenock Marine Insurance Company*, 2 H. L. Cas. 159; *Shaue v. Felton*, 2 East, 109; *Allan v. Sagrue*, Dans. & Ll. 188; 8 B. & C. 561; 3 Man. & Ryl. 9; *Samuel v. Royal Exchange Assurance Company*, 8 B. & C. 119.

In certain cases of loss of goods, no great difficulty arises in deter-

mining whether the total loss is absolute or merely constructive. Thus, where the goods go down into deep water with a vessel foundered at sea, or have been seized in an enemy's port (*Mellish v. Andrews*, 15 East, 18; and see *Mullett v. Shaddon*, 18 East, 304), or have been plundered by wreckers (*Bondrett v. Hentigg*, Holt, N. P. 149), without any hope of recovery down to the time of action brought, it will be a case of absolute total loss, and no notice of abandonment will be necessary.

If however there remains a hope of recovering the goods insured before action brought by the assured, it will not be considered a total loss unless notice of abandonment has been given. Thus if the goods insured were seized and confiscated by the enemy, but there remains a hope of recovering them, as, for instance, by the commencement of negotiations for that purpose by the government of the assured, if the goods are restored before action brought, it will not be considered a total loss, unless notice of abandonment has been previously given. *Goldsmid v. Gillies*, 4 Taunt. 303. "Is it not," said Lord *Ellenborough*, "an established and familiar rule of insurance law, that where the thing insured subsists *in specie*, and there is a chance of recovery, in order to make it a total loss there must be an abandonment?" *Tunno v. Edwards*, 12 East, 491. From which *dictum* we may draw the inference that, in order to ren-

der abandonment necessary, the thing insured must not only subsist *in specie*, but there must also be a *spes recuperandi*.

Greater difficulties arise in determining these questions in the case of *perishable* goods, and they arise more frequently, because, in the case of perishable goods, they are generally, by the memorandum to the policy, warranted "free of average," that is to say, nothing is to be recovered in respect of them in case only of an average or partial loss, but only when a total loss has taken place.

We may however here remark, as is laid down in the principal case, that whether the loss be total or partial in its nature depends on general principles. The memorandum does not vary the rules upon which a loss shall be partial or total: it does no more than preclude the indemnity for an ascertained partial loss, except on certain conditions. *Ante*, p. 134.

It seems at one time to have been thought, that if goods remained in specie, although so changed as to be no longer of any value in their original character, it could not be considered as a total loss, and consequently, when such goods were warranted "free from average," nothing could be recovered from the underwriter. Thus, in *Cocking v. Fraser* (4 Doug. 295; Park, 247, 8th ed.), goods were insured with the usual memorandum. "Corn, fish, etc., warranted free from average, unless general, or the ship should be stranded." A quantity of fish, part of the

goods insured, were so much damaged by the perils of the seas, that they were hove overboard for the general preservation of the rest of the fish and cargo. And upon the arrival of the ship at Lisbon, upon a survey being made at the request of the captain, who was also consignee of the fish, by the Board of Health of Lisbon, it appeared that the fish were rendered of no value, and the ship consequently did not proceed. It was held by Lord *Mansfield*, C. J., that the loss was not total, and that consequently the plaintiff could not recover anything upon the insurance. "What," said his Lordship, "is a total loss? The total loss of a thing is *the absolute destruction* of it, by the wreck of the ship. The fish may all come to port, though from the nature of the commodity it may be damaged,—it may be stinking,—still, as the commodity *specifically remains*, the underwriter is discharged." *Buller, J.*, also made the observation, "that there never was an instance of a payment for a total loss in these cases where the thing existed, though of no value."

The authority of this case was questioned by Lord *Kenyon*, C. J., in *Burnett v. Kensington*, 7 T. R. 222, and indeed it may be now considered as overruled. The first case to be noticed in which Lord *Kenyon's* views were adopted, is that of *Dyson v. Rowcroft* (3 Bos. & P. 474): there a policy was effected on fruit, from Cadiz to London, which contained the usual memorandum that fruit, etc., were

warranted free from average. In the course of the voyage the fruit was so much damaged by sea-water, that it became rotten, and stunk ; and on the ship's arrival at an intermediate port, into which she was driven, the government of the place prohibited the landing of the cargo. The ship also, being too much damaged to proceed on the voyage, was sold, and the cargo necessarily thrown overboard. It was held by the Court of Common Pleas that the assured were entitled to recover as for a total loss. "If," said Lord *Alvanley*, C. J., "I understand the policy as restrained by the memorandum, the underwriter agrees that all commodities shall arrive safe at the port of destination, notwithstanding the perils insured against ; but that he will not be liable to pay for any partial loss on fish, or the other articles contained in the memorandum, because those commodities being liable to deterioration from circumstances independent of the perils insured against, he would continually be harassed with claims for partial loss alleged to have arisen from the perils mentioned in the policy. Unless therefore the consequence of the damage sustained be the total loss of the commodity, the underwriter does not agree to be answerable ; but if the commodity be totally lost to the assured, he undertakes to pay. If this be not the meaning of the memorandum, it is badly expressed ; and the underwriters would have done better if they had said that they would not be answerable un-

less the commodities enumerated actually went to the bottom. The question is, what is a total loss ? I admit that the circumstances of cases like the present are generally suspicious. If the voyage be protracted, deterioration necessarily takes place ; and it becomes the interest of the captain and mariners to turn the injury into a total loss. But this is matter for the consideration of the jury. We ought, indeed, to look at the case with some suspicion, where there is so much temptation to throw the cargo overboard. But here it is found that the necessity of so doing arose from sea-water shipped during the course of the voyage ; and that the commodity was in such a state that it could not be suffered to remain on board consistently with the health of the crew. In consequence of this necessity, therefore, the commodity was annihilated, by being thrown overboard. Had it not been so annihilated, it would have been annihilated by putrefaction ; and is it not as much lost to the assured by being thrown overboard, as if the captain had waited until it had arrived at complete putrefaction ? The case of *Cocking v. Fraser* was the only thing which raised any doubt in my mind ; and it is certainly a very strong case. But the authority of that case is much shaken by the observation of Lord *Kenyon* upon it, in *Burnett v. Kensington*. I suspect that the words "of no value," applied to the cargo in the case of *Cocking v. Fraser* are somewhat too large,

and that the fact was, not that the cargo was in such a situation as to make it impossible to preserve it, but that it was so much damaged as to be no longer valuable to the owners, because it was not worth carrying to the port of destination. Lord Kenyon, speaking of *Cocking v. Fraser*, says that he cannot subscribe to the opinion there given, that 'if the commodity specifically remain, the underwriter is discharged' (Marshall, p. 144): I think myself therefore at liberty to consider the case of *Cocking v. Fraser* as something less strong than it appears to be. The question then is, whether the loss which has happened be not as much a total loss as if the waves had carried the cargo overboard, or as if it had been directly prevented from arriving at the port of destination, by some of the perils insured against? I never have understood that the underwriters insure fish against no perils which do not end in a total annihilation of the commodity. When the loss arises by capture, the commodity remains in existence in the hands of the enemy; and yet this loss is as much within the policy as a loss arising from the wreck of the ship. I must now take it that the circumstances under which the cargo in this case stood, were such that sea-damage had so operated as to make it impossible for the captain to keep it any longer on board. Whether the cause of the loss were direct or indirect, it produced a total annihilation of the commodity."

In the case of *Cologan v. London*

Assurance Company, 5 M. & Sel. 447, where wheat insured "free of average" had been thrown away in a putrid state, Lord Ellenborough, C.J., said:—"Considering the contract of insurance as a contract of indemnity, it surely cannot be less a total loss because the commodity subsists in specie, if it subsists only in the form of a nuisance. There is a total loss of the thing, if by any of the perils insured against it is rendered of no use whatever, although it may not be entirely annihilated."

In the principal case, as decided by the Exchequer Chamber, reversing the decision of the Court of Common Pleas, reported (1 Bing. N. C. 524; 1 Scott, 491) this subject was very fully discussed, and the principles upon which the Court proceeded are, to use the words of an able text-writer, "admirably stated by Lord Abinger, in giving the judgment of the Court,—a judgment which should be attentively studied by all who desire to know the present state of our law on this much litigated subject." 2 Arn. Mar. Ins. 1044, 2nd ed. There hides insured free of particular average, having been sold at an intermediate port in a state of incipient putridity, because they would have been destroyed before they could have reached their destination, it was held by the Exchequer Chamber that the assured might recover as for a total loss, without abandonment.

From this and the former decisions it seems to be clear that

where perishable goods, although they exist in specie, have by the perils insured against either already lost their original character, in consequence of which they have been thrown overboard, or if they are in such a state that it is clear that they would inevitably lose their original character previous to their arrival at the port of their destination, and they are in consequence sold at an intermediate port, the insured may recover for a total loss, without any notice of abandonment.

Where however, though much damaged, the goods exist in specie, and there is a reasonable expectation that they may arrive at their port of destination, without their original character being changed; the assured, who has not sent them on, or has sold them at an intermediate port, cannot, at any rate, without notice of abandonment, recover as for a total loss. Thus, in *Anderson v. The Royal Exchange Assurance Company*, 7 East, 38, a vessel laden with corn insured "free of average," from Waterford to Liverpool, when sailing down the river from Waterford, struck upon a rock, which occasioned her immediately to fill with water, and to prevent her from sinking she was run ashore. The hull of the ship was for four weeks entirely submerged at high water. The wheat was got out much damaged; part was thrown into the sea as unfit for use, part was kiln-dried at Waterford, and sold there, although it might have been forwarded to Liverpool had

the insured given directions for that purpose. It was held by the Court of Common Pleas that the assured could not recover for a total loss. "It was not," said his Lordship, "in fact, as it turned out, a total loss; but during the time it was submersed in the water it might have been treated as such. They did not however treat it as a total loss at that time, but continued labouring on the vessel and cargo on their own account for some time afterwards, from the 31st of January till the 18th of February, and had succeeded in preserving part of it, and did not elect to abandon till they found that it would not answer to keep to the cargo; and when they did abandon it was no longer in fact a total loss."

Upon the same principle, in the case of *Hedburgh v. Pearson*, 7 Taunt. 154, where there was an insurance "on hogsheads of sugar," warranted "free from particular average," from Gottenburgh to Stralsund, and the ship was stranded and bilged, but every one of the fifty-four hogsheads of sugar on board was saved, and some of the loaves of sugar in each hogshead. But of the whole cargo of sugar, there being about a hundred and twenty loaves to each hogshead, only seventy-eight loaves were saved dry, and forty-five wetted by the sea. It was held by the Court of Common Pleas that, inasmuch as it could not be said that none of the sugar was saved, they could not draw any measure of a proportion to be saved, which

should be compatible with a total loss. If they should begin to do so, they could not see where they were to stop; and even if this were a fit case for the consideration of the Court, they thought the jury had rightly decided it." See also *Thompson v. Royal Exchange Company*, 16 East, 214; the remarks of Lord Abinger, C. B., upon these cases, *ante*, p. 136; and *Navone v. Haddon*, 9 C. B. 36.

Although as a general rule where the whole or any part of a cargo of perishable goods (having suffered from sea damage), is practically capable of being sent in a marketable state to its port of destination, the master cannot sell, nor can the assured recover as for a total loss; nevertheless, if the damage cannot be repaired without laying out more money than the thing is worth, the reparation is impracticable, and therefore, as between the underwriters and the assured, impossible, and the master, as in the case of a ship similarly situated (see *ante*, p. 145), may sell the cargo, and the assured can recover as for a total loss. See *Rosetto v. Gurney*, 11 C. B. 176, 187, and the remarks there upon the case of *Reimer v. Ringrose*, 6 Exch. 263.

Where goods arrive in specie at the port of destination, however much they may be damaged, or deteriorated in value and quality, if they still retain their original character, it will not be held to be a total loss (see *M'Andrews v. Vaughan*, Park, 252, 8th ed.; *Mason v. Skurray*, ib. 253; *Glennie*

v. London Assurance Company, 2 M. & Sel. 376); and it is immaterial that the vessel is wrecked, if the goods or some of them arrive at their destination. *Davy v. Milford*, 15 East, 559. The cases of *Boyfield v. Brown*, 2 Str. 1065 and *Buller v. Christie*, cited 2 M. & Sel. 374, must be considered as overruled.

It seems also that although the goods arrive at their destination in specie, if they are so deteriorated as to have lost their original character, it will be an absolute total loss, for which the underwriter will be liable, although the goods are warranted free of average. This, at any rate, appears to have been the opinion of Lord Abinger in the principal case, but there has been no express decision upon the point; see also *Reimer v. Ringrose*, 6 Exch. 267.

Where a cargo is made up in packages, and the insurance is upon each package separately, it will be treated as a total loss upon such package lost, per Lord Abinger, in *Hills v. London Assurance Company*, 5 M. & W. 576.

But if goods of the same species are shipped, whether in bulk or in packages, not expressed, by distinct valuation or otherwise, in the policy to be separately insured, though part only, or one or more entire packages be entirely lost or destroyed by the specified perils, it will not be considered a total loss or destruction of such part only; the consequence in such case is, that if the goods lost be "free of average" the underwriter will be exempted

from all liability, the loss being only partial. *Ralli v. Janson*, 6 Ell. & Bl. 422, 446, overruling the decision on this point in *Davy v. Milford*, 15 East, 559, and some of the dicta in *Hedburgh v. Pearson*, 7 Taunt. 152, and in *Cologan v. London Insurance Company*, 5 Mau. & Selw. 456; and see *Entwistle v. Ellis*, 2 Hurlst. & N. 549, in which case on an insurance of goods in "ship or ships" which were declared to be valued "on rice to be declared free from particular average," it was held that the insurer could not by indorsing a declaration of interest with a separate valuation of each bag of rice, create a separate insurance on each bag.

Where however goods of *different species* are insured generally "free from average," if some of them be entirely lost, the assured will be able to recover as for a total loss on account of the goods so lost. Thus, in *Duff v. Mackenzie*, 3 C. B. (N.S.) 16, an insurance was effected on "*master's effects*," valued at £100, "*free from all average*." Some of the articles thus insured were totally lost by the perils insured against, but others were saved. It was held by the Court of Common Pleas that the assured was entitled to recover in respect of the goods which had been so totally lost. "The word 'effects,'" said *Williams, J.*, in delivering the judgment of the Court, "is obviously employed to save the task of enumerating the nautical instruments, the chronometer, the clothes, books, furniture, etc., of

which they happened to consist. And although it is stipulated by the warranty that these effects shall be free of all average, or, in other words, that the insurer shall not be liable for any amount of sea-damage to them short of a total loss—we think, looking at the nature of the subject of insurance, and the terms of this exemption, it is doing no violence to the language used, to hold that he is not to be exempted from liability for a total loss of any of the articles of which the 'effects' consist. Suppose, instead of the general description of 'master's effects,' the body of the policy had enumerated them, and then the memorandum had said, 'the chronometer, the sextant, to be free from average,' etc., might not this be well understood to mean that the insurer was not to be liable for any partial damage, but was to be liable for any total loss of any of the specific things mentioned in the memorandum? And if so, we do not feel constrained to hold that the intention of the parties is different, and the subject of insurance one indivisible subject, merely because the description in the policy of the articles insured is general, and the memorandum extends to the whole subject of the insurance."

Upon the same principle, in *Wilkinson v. Hyde*, 3 C. B. (N.S.) 30, an insurance was effected for £240, "*on goods so valued against total loss only*." The policy contained the usual memorandum against particular average. The cargo thus insured consisted of *different*

kinds of goods, in separate cases and packages, some of which were, by the perils insured against, totally lost, and others were saved. It was held by the Court of Common Pleas that the assured was entitled to recover in respect of the packages so totally lost. "Applying," said *Williams, J.*, "the doctrine of *Duff v. Mackenzie* here, as soon as it is ascertained that goods are of *different species*, it is as if the different species had been enumerated. The words 'against total loss only' cannot mean 'total loss of the whole subject of insurance,' taken collectively, as Mr. Blackburn contends. The object is simply to get rid of the common average memorandum,—to exempt the underwriters from responsibility except in respect of a total loss of the subject-matters of insurance, each taken separately. I see no more reason why the different sorts of 'goods' should be enumerated, than that 'master's effects' should be separately described. The underwriter who insures 'goods' has no right to expect that they shall be all of one species."

When a ship founders at sea, and with her cargo is lost beyond hope of recovery, it is clear that a total absolute loss of freight has taken place. And where a chartered ship is lost, when about to sail to a distant place to take in her cargo, it will be held that the risk commenced at the time of her sailing, although she had no cargo then on board. The leading case on this subject is *Thompson v.*

Taylor, 6 T. R. 478, where a ship was chartered from London to Teneriffe, there to take on board a certain number of pipes of wine, and to proceed to Barbadoes, for which the owner was to receive freight at the rate of so much per pipe. The vessel was taken prize on her voyage to Teneriffe. It was held by the Court of King's Bench that a policy of insurance on such freight attached from the sailing of the ship. "As the plaintiff," observed Lord *Kenyon, C.J.*, "had begun to perform his part of the contract, as he had done something under it, which, if matured, would have entitled him to his freight, I think he may recover on this policy, which was an insurance on that freight. His contract under the charter-party was entire, and we cannot divide it. The ship was to sail from hence to Teneriffe, where she was to take wine on board, and carry it to the West Indies; he was to receive freight for the whole voyage, and the plaintiff had performed part of the contract. Therefore, on the principle on which the case in *Strange (Tonge v. Watts)*, 2 Stra. 1251 was decided, though the circumstances of that case are different from the present, I am of opinion that the plaintiff is entitled to recover." See also *Horncastle v. Suart*, 7 East, 400; *Mackenzie v. Shedden*, 2 Camp. 431.

Where an insurance has been effected on freight, to become payable on delivery of the goods, by a *general ship*, if a full cargo has been contracted for, and, though

lying at some distance, is ready to be put on board, and the ship is ready to receive it, even though temporarily disabled by the perils insured against, the assured may recover as for a total loss, although, at the time of the loss of the ship, only a part, or even none, of the cargo was on board. *Montgomery v. Egginton*, 3 T. R. 362; S. C. cited and commented on, 13 East, 330, 331; *Devau v. J'Anson*, 5 Bingh. N. C. 519.

Where however the ship is lost with only a part of her cargo on board, and the rest of her cargo is not contracted for, and the ship, independently of any disability in consequence of the perils insured against, is not ready to receive it, the assured is not entitled to recover for a total loss, but an apportionment only according to his actual loss. See *Forbes v. Aspinall*, 13 East, 323, 332; *post*, p. 185, 192; *Forbes v. Cowie*, 1 Camp. 520.

In the case of a chartered vessel, where the payment of the freight is in the charter-party made to depend on the delivery of a particular cargo at the ultimate port of destination, if the vessel be captured before the goods be put in at an intermediate port, the assured can recover for an absolute total loss. *Atty v. Lindo*, 1 Bos. & P. N. R. 236.

So the capture and sale of an outward cargo will involve an absolute total loss of *outward* freight, although the vessel, on being repurchased by the master, may succeed in gaining a *homeward* freight (*Wilson v. Forster*, 6 Taunt. 25).

Where however the insurance is effected on the *homeward* freight, on goods to be put on board by certain charterers, and no cargo is put on board by them, if a full freight is earned by the vessel returning home with a cargo belonging to other persons, the assured cannot recover for a total loss from the underwriters, even though the expenses of the vessel while detained waiting for another cargo exceed in amount the freight which she thereby earned. *Ewerth v. Smith*, 2 Mau. & S. 278, 284; *Barclay v. Stirling*, 5 Mau. & Selw. 6; *Brocklebank v. Sugrue*, 1 Mood. & B. 102. And see and consider *Mackrell v. Simond*, 2 Chit. Rep. temp. Mansfield, 666.

In the case of an insurance of profits, if there is a total loss of the goods on which the profits were expected to be made, the insurer may recover as for a total loss of the freight; and even if there has been only a partial loss of the goods, if the goods have been abandoned, a separate abandonment of the profits to arise from them is unnecessary. *Barclay v. Cousins*, 2 East, 544, 551.

2. *Of constructive total Loss.*—As before observed, a constructive total loss takes place where the subject of insurance is not wholly destroyed, but is placed in such peril as to render the successful prosecution of the adventure improbable and such as a prudent man uninsured would decline any further expense in following up. In such a case the insured, upon giving

notice to the insurers that he abandons all his interest in the subject-matter assured, may treat the case as a total loss. The notice of abandonment, as will be hereafter more fully shown, must be given within a reasonable time,—it must be of the whole thing insured and unconditional in its terms.

In the principal case, Lord *Abinger*, C. B., enumerates the cases in which a constructive total loss takes place. "There may," he observes, "be a capture, which, though *prima facie* a total loss, may be followed by a recapture, which would revest the property in the assured. There may be a forcible detention, which may speedily terminate, or may last so long as to end in the impossibility of bringing the ship or the goods to their destination. There may be some peril which renders the ship un navigable, without any reasonable hope of repair, or by which the goods are partly lost, or so damaged that they are not worth the expense of bringing them, or what remains of them, to their destination." *Ante*, p. 140. These and similar cases it is now proposed to examine in detail.

Where a ship is captured, the assured has immediately a right to give notice of abandonment, and he will be able to recover for a total loss, provided the capture or the total loss occasioned thereby continue to the time of abandoning and bringing the action. See *Hamilton v. Mendes*, 2 Burr. 1212. Where however, at the time when the notice of abandonment is given, the assured is aware of the recap-

ture (*Hamilton v. Mendes*, 2 Burr. 1198), or the recapture has actually taken place, and he is not aware of it (*Bainbridge v. Neilson*, 10 East, 329; *Parsons v. Scott*, 2 Taunt. 863; *Naylor v. Taylor*, 9 B. & C. 718), and even where the capture continues until the notice of abandonment, if the recapture takes place before action brought, the assured cannot claim to recover for a total loss. See *Patterson v. Ritchie*, 4 Mau. & Selw. 393; *Naylor v. Taylor*, 9 B. & C., 724; and *Brotherston v. Barber*, 5 Mau. & Selw. 418. In the last-mentioned case, the vessel insured was captured on the 19th of April. Notice of abandonment was given on the 25th of April, and the recapture and restoration of the ship took place before action brought. It was held by the Court of King's Bench (a partial damage having been sustained), that the assured could only recover for a partial loss. "This is," said *Bayley*, J., "a contract of indemnity only; the ship was captured in the course of her voyage. Now capture is an event which may or may not terminate in a total loss; if it continue, and terminate in a total loss, the assured will be entitled to his full indemnity; but if the capture be only temporary, and the loss partial, it would be against the spirit as well as the letter of the contract to hold the underwriter bound to take to the subject-matter insured, and to allow the assured, who stipulates only for indemnity, to come upon the underwriter for the whole amount

of his subscription, while the subject-matter insured subsists in perfect safety. What is it that is thus to entitle the assured to demand more than the safety of the thing insured? It is said that abandonment gives this right, by closing the transaction between the underwriter and assured. But notice of abandonment is no more than a proposal on the part of the assured, which the underwriter may accept, and then there will be a new agreement between them, binding on both parties. But while the transaction rests in abandonment only on one side, the underwriter's responsibility may vary, and cannot amount to a total loss, if, by subsequent events, it has become otherwise at the time of action brought."

The mere recapture however of a ship, if, in consequence of the improper conduct of recaptors, the ship be not restored to the assured, or they have not the means of recovering her, will not prevent their claim for a total loss. Thus, in *Dean v. Hornby*, 3 Ell. & Bl. 180, a ship was insured on a time-policy, for a year ending the 21st of April, 1852. In December, 1851, being on her homeward voyage from Valparaiso to Liverpool, she was captured by pirates in the Straits of Magellan. In January, 1852, she was recaptured by an English war-steamer, and a prize-master took the command and brought her to Valparaiso. Intelligence of the facts reached the owners at one time, about the end of April, 1852, and they on

the 30th of April, 1852, gave notice of abandonment to the underwriters, stating that intelligence had arrived "of the condemnation at Valparaiso" of the vessel "as a prize to her Majesty's steamer." The underwriters refused to accept notice. The vessel was sent home by the recaptors from Valparaiso, under the command of a prize-master, with instructions to proceed to Liverpool, and obtain an adjudication in the Court of Admiralty. She met with bad weather, and put into Fayal on the 19th of August, 1852, where she was sold by the prize-master, being then in a state not justifying the sale. In December, 1852, the owners having commenced an action against the underwriters, it was held by the Court of Queen's Bench that they were entitled to recover for a total loss. "The cases referred to," said Lord Campbell, C. J., "establish this principle, that if once there has been a total loss by capture, that is construed to be a permanent total loss, unless something afterwards occurs by which the assured either has the possession restored, or has the means of obtaining such restoration. The *right to obtain it is nothing*; if that were enough to prevent a total loss, there never would in this case have been a total loss at all; for pirates are the enemies of mankind, and have no right to the possession."

Where however after the capture of a ship, notice of abandonment has been duly given, although she be afterwards restored, if she

be in such a state that her repairs would cost more than she is worth, the assured can recover for a total loss. See *M'Iver v. Henderson*, 4 Mau. & Selw. 576. "The mere restitution of the hull," said Lord *Ellenborough*, C. J., "if the assured may eventually pay more for it than it is worth, is not a circumstance by which the totality of the loss is reducible to an average one." *Ib.* 584. See also *Brown v. Smith*, 1 Dow, P. C. 349; *Holdsworth v. Wise*, 7 B. & C. 794.

If the ship is restored in such a state as not to justify an abandonment, the mere loss of the voyage will not have that effect. *Fitzgerald v. Pole*, Willes, 641; 5 Bro. P. C. 181; *Parsons v. Scott*, 2 Taunt. 363; *Falkner v. Ritchie*, 2 Mau. & Selw. 290; *Brown v. Smith*, 1 Dow, P. C. 359; *Doyle v. Dallas*, 1 Mood. & Rob. 55; so that the contrary doctrine upon this subject laid down in some of the earlier cases (*Goss v. Withers*, 2 Burr. 683; *Hamilton v. Mendes*, 2 Burr. 1198; *Milles v. Fletcher*, 1 Doug. 231; *Cazalet v. St. Barbe*, 1 T. R. 187; *Rotch v. Edie*, 6 T. R. 413) by Lord *Mansfield*, Mr. Justice *Buller*, and Lord *Kenyon*, may be considered as overruled.

The assured will not however be entitled to recover for a total loss, unless he has, during some period of the risk, been completely deprived of his ship. See *Thornely v. Hebson*, 2 B. & Ald. 513, there the crew of a vessel in distress, worn out by fatigue, deserted her in order to save their lives, and she was at the same time

taken possession of by eight fresh men from the ship to which the crew had escaped, who volunteered, at the risk of their lives, to go on board the vessel in distress, in the hope of bringing her into port, and thus earning salvage. They succeeded in bringing the vessel into port, where she was sold under a decree of the Admiralty Court to pay for the salvage. Notice of abandonment had been given. It did not however appear that the assured had taken any means to prevent the sale. It was held by the Court of King's Bench that the assured had no right to abandon, and could only recover for a partial loss. "Where a ship is captured," said *Bayley*, J., "she is taken possession of by persons *adversely* to the owner, and so it is in the case of *barratry*; but here the ship was taken possession of by persons acting, not adversely, but for the *joint benefit* of themselves and the owners, and the latter were never dispossessed of the vessel. The desertion of the crew therefore does not amount to a total loss." It was also held that the sale did not amount to a total loss, as it did not appear that the sale was necessary, or that the owners might not have prevented it.

If there be an arrest, detention, or embargo of a ship, unless it is of very short duration (*Forster v. Christie*, 11 East, 205), the ship-owner will *prima facie* have an immediate right to abandon. *Rotch v. Edie*, 6 T. R. 413.

Where however a captured ves-

sel has been bought by the master, if no notice of abandonment has been given, he will be considered as agent for the owners, and upon his restoring her to them, they will only be entitled to claim for an average loss. *M'Masters v. Shoolbred*, 1 Esp. 236. It was admitted however by the Court in that case, "that when the ship had been captured and carried into port in the enemy's possession, the insured might then have abandoned it, and so have made it a total loss." *Ib.* p. 239. See also *Wilson v. Forster*, 6 Taunt. 25; 1 Marsh. Rep. 425.

We have before seen in what cases the assured is entitled to recover for a total loss of the ship without notice of abandonment. There are however, as observed in the principal case by the Chief Baron, "intermediate cases." Thus, where the ship has been reduced to such a state by the perils insured against that she cannot keep at sea without repairs, and the repairs either cannot be effected in the place where the injury occurs (*Somes v. Sugrue*, 4 C. & P. 283), or, if being in a place where they may be done, he has no funds in his possession, and is not able to raise any (*Read v. Bonham*, 3 Brod. & Bing. 147), unless his inability arises from the fault of the agents or correspondents of the assured (*Tanner v. Bennett*, Ry. & Mood. 182), then the master is justified in selling the ship, and the assured, on giving due notice of abandonment, may recover for a total loss. The mere fact that the rate of bottomry interest is extravagantly

high (*Somes v. Sugrue*, 4 C. & P. 276; *Morris v. Robinson*, 3 B. & C. 196; 5 Dowl. & Ry. 34; *Cannon v. Meaburn*, 1 Bing. 243; 8 Moore, 127), or that there is a difficulty in procuring materials for repairs (*Furneaux v. Bradley*, Park on Ins. 365), will not justify a sale by a master, nor consequently an abandonment by the assured. For it will be found on an examination of the authorities that the right to abandon depends, not upon the fact that a sale has been effected by the master, but upon the fact whether the sale was or not, under the circumstances, justifiable. See *Miles v. Fletcher*, 1 Doug. 232; *Plantamour v. Staples*, 1 T. R. 611 n.; 1 Mood. & Rob. 117.

A sale will be justifiable, and consequently on giving notice the assured can recover as for a constructive total loss, either when there is no reasonable hope of extricating the vessel at all (*Idle v. Royal Exchange Assurance Company*, 3 Moore, 115; 8 Taunt. 755; 3 Brod. & Bing. 151 n.; *Hunter v. Parker*, 7 Mees. & W. 322), or of extricating or repairing her except at a cost greater than her value when repaired. *Robertson v. Caruthers*, 2 Stark. 571; *Robertson v. Clarke*, 1 Bing. 445; 8 Moore, 622; *Mount v. Harrison*, 4 Bing. 388; 1 Moo. & P. 14.

In all these cases the assured will not be able to claim as for a constructive total loss, unless, at the time of the sale, that proceeding appeared, in the prudent exercise of the best and soundest judg-

ment that could then be formed, to be most beneficial to all parties concerned (see *Morris v. Robinson*, 3 B. & Cr. 196; 5 Dowl. & Ry. 35; *Cannan v. Meaburn*, 1 Bing. 243; 8 Moore, 127; *Doyle v. Dallas*, 1 Mood. & Rob. 48; *Gardner v. Salvador*, 1 Mood. & Rob. 116; *Knight v. Faith*, 15 Q. B. 649; *Dommett v. Young*, 1 Carr. & Marsh. 465); but where such a judgment has been exercised, he can claim for a constructive total loss, even although the vessel has been recovered and repaired by the purchaser at a cost much less than her repaired value. *Idle v. Royal Exchange Assurance Company*, 3 Moore, 115; 8 Taunt. 755; *Robertson v. Caruthers*, 2 Stark. 571. And it is immaterial whether the sale be effected by the master alone, or by the master with the sanction of one of the part-owners (*Idle v. Royal Exchange Assurance Company*, 3 Moore, 115; 8 Taunt. 755), or even by the owner or a part-owner who is also master. See *Green v. Royal Exchange Assurance Company*, 1 Marsh. 447; 6 Taunt. 68; *Doyle v. Dallas*, 1 Mood. & Rob. 48; *Knight v. Faith*, 15 Q. B. 649.

A sale however of the vessel is not essential in such cases in order to enable the assured to recover for a constructive total loss, for it is clear that where the estimated costs of the repairs of a vessel exceed the repaired value, the assured may, without a sale, upon giving a proper notice of abandonment, recover for a constructive total loss. *Allen v. Sugrue*, 8 B. & C.

561; 3 Man. & Ry. 9; *Young v. Turing*, 2 M. & Gr. 593.

As to the nature of the repairs, the cost of which will exceed the value of the ship, the mode of estimating their cost, and the value of the ship, see *Reid v. Darby*, 10 East, 143; *Doyle v. Dallas*, 1 Mood. & Rob. 48; *Thompson v. Colvin*, Ll. & Wels. 140; *Read v. Bonham*, 3 Brod. & Bing. 147; *Morris v. Robinson*, 3 B. & Cr. 196; 5 D. & Ry. 35; *Cannan v. Meaburn*, 1 Bing. 243; *Somes v. Sugrue*, 4 C. & P. 276; *Mount v. Harrison*, 4 Bing. 388; *Gardner v. Salvador*, 1 Mood. & Rob. 116; *Phillips v. Nairne*, 4 C. B. 343; *Allen v. Sugrue*, 8 B. & C. 561; 3 M. & Ry. 9; *Dans. & Ll.* 188; *Young v. Turing*, 2 M. & G. 593; 2 Scott, N. R. 752; *Manning v. Irving*, 1 C. B. 168; 1 H. L. Cas. 287.

Where the master of a ship, instead of selling or abandoning her, elects to repair her, raising money for the purpose by a bottomry bond, the owner will not, on the arrival of the vessel at home, be entitled to abandon because the amount spent on repairs is greater than the value of the ship, as shown by her sale in order to satisfy the bottomry bond. *Benson v. Chapman*, 6 M. & Gr. 792; *Chapman v. Benson*, 5 C. B. 330; 2 H. L. Cas. 696.

Where however the owner of a vessel relinquished his intention of abandonment, in consequence of the underwriters requesting him not to do so, and ordering repairs for which a bottomry bond was given, upon the refusal of the un-

derwriters to pay the bottomry bond on the arrival of the ship, in consequence of which the ship was sold, they were held liable for all the damage which accrued to the owner in consequence of that refusal. *Da Costa v. Newnham*, 2 T. R. 407.

As in the case of a ship, if the cargo has been captured, and there is a *spes recuperandi*, it is necessary for the assured to give notice of abandonment in order that he may recover as for a total loss (*Tunno v. Edwards*, 12 East, 488; *Goldsmid v. Gillies*, 4 Taunt. 802); but even if he have given notice in such a case, his right to recover as for a total loss will be divested if the cargo be restored before action brought. *Naylor v. Taylor*, 9 B. & C. 718; 4 M. & Ry. 526; *Dans. & Ll.* 240. But this will not be the case where the goods have not been effectively restored to the hands of the owners after a capture, as, for instance, where, after a recapture, they have been detained in consequence of an embargo (*Cologan v. London Assurance Company*, 5 Mau. & Selw. 447); or where, after the goods have been ordered to be restored to the owners, it becomes impossible to take them to their port of destination in consequence of its being blockaded. *Barker v. Blakes*, 9 East, 283. So where after desertion of the ship by the crew, notice of abandonment has been duly given by the owner of the goods, their delivery to his agent abroad, before action brought, so much damaged that they would have been worthless if sent on to their port of des-

tination, will not be considered to be such a restoration as will defeat the abandonment made on the desertion of the ship by the crew. *Parry v. Aberdeen*, 9 B. & C. 411.

The mere fact of goods being sent to this country by persons acting neither as agents nor on behalf of the assured will not be considered such a restoration as will defeat a notice of abandonment properly given. See *Dixon v. Reid*, 5 B. & Ald. 597; there a ship with its cargo was bartrously taken out of her course by the crew to Barbadoes, where the ship was condemned and sold, and part of her cargo (47 logs of timber) was also sold to pay the charges incurred there, and the remainder, consisting of 186 logs, was forwarded to London by another vessel. The insured abandoned to the underwriters. On the arrival of the logs, the plaintiff at first proposed to settle the loss with the underwriters at £69. 9s. 6d. per cent., but they refused to settle upon those terms, and the logs were afterwards sold, but not by the plaintiff, who brought an action for a total loss. It was held by the Court of King's Bench to be a case of total loss. "Here," said *Abbott, C. J.*, "by the fraud and barratry of the master and mariners, the cargo was taken out of the possession of the assured. From that time it became to them a total loss. The payment of the wages at Barbadoes and the sending home of the 186 logs were *not the acts of the assured*, or any person authorized by them. I think

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therefore that this was a total, and not an average loss."

Notwithstanding some of the older decisions (*Manning v. Newnham*, 3 Dougl. 130; *Milles v. Fletcher*, Dougl. 231), it appears now to be settled that a mere loss or retardation of the voyage for the season is not a constructive total loss on *imperishable* goods, and will only be considered so with respect to *perishable* goods when they have received such sea-damage as that they could not be forwarded from their port of distress so as to arrive at their port of destination in a merchantable state, or except at an expense exceeding the value of the goods. Thus, in *Anderson v. Wallis*, 2 Mau. & Selw. 240, there was a policy of assurance on goods, consisting of copper and iron, warranted "free of particular average," at and from London to Quebec, and the ship, owing to sea-damage in the course of her voyage, was obliged to run into the nearest port—Kinsale in Ireland—to undergo repairs. She could not however be repaired in time to prosecute her voyage that season. There was not any ship at Kinsale or Cork to be procured to forward the cargo, so that the voyage was abandoned, and the captain ultimately sailed on another voyage. The cargo was damaged and sold as a damaged cargo at Kinsale, and notice of abandonment was duly given. It was held by the Court of King's Bench that this was not a total loss of the goods, and that the assured could not abandon: "The case of an inter-

ruption of the voyage," said Lord *Ellenborough*, C. J., "does not warrant the assured in totally disengaging himself from the adventure, and throwing this burthen on the underwriters. It is unnecessary to pursue the subject farther, as there is not any case or any principle which authorizes an abandonment, unless where the loss has been actually a total loss, or in the highest degree probable at the time of abandonment."

The result will be the same where, although the thing insured is of a perishable nature, it is not so sea-damaged as to render it likely to be spoiled if kept until another vessel can be found to forward it to its port of destination. *Hunt v. Royal Exchange Assurance Company*, 5 M. & Selw. 47. See also *Van Omeron v. Dowick*, 2 Campb. 42; *Wilson v. Millar*, 2 Stark. 1; *Underwood v. Robertson*, 4 Campb. 138; *Wilson v. Royal Exchange Assurance Company*, 2 Campb. 623.

Although the cargo is at one time so far lost (for instance, by submersion) as to give a right to abandon, yet if no notice of abandonment be given, and it is afterwards recovered in such a state as that it can be forwarded to its port of destination in a marketable condition, the assured cannot by selling treat the case as one of total loss. See *Anderson v. Royal Exchange Assurance Company*, 7 East, 38, and *ante*, p. 136, where it is alluded to by the Chief Baron in the principal case. See also *Thompson v. Royal Exchange Assurance Company*, 16 East, 214.

So if only a *part* of the cargo can be forwarded by the master to its destination, he cannot by selling the whole make the loss total. *Freeman v. East India Company*, 5 B. & Ald. 617; *Morris v. Robinson*, 8 B. & C. 196; 5 Dowl. & Ry. 34; *Cannan v. Meaburn*, 1 Bingham 243; 8 Moore, 127; *Moss v. Smith*, 9 C. B. 94.

Where however the goods are sold because they are so sea-damaged, that if sent on to their port of destination they would be worth nothing, this would be clearly a case of total loss. *Parry v. Aberdeen*, 9 B. & Cr. 411; and see *Reimer v. Ringrose*, 6 Exch. 263.

On the other hand, if the damage is reparable, the loss is total or partial, according to circumstances. If the damage cannot be repaired without laying out more money than the thing is worth, the reparation is impracticable, and therefore as between the underwriters and the assured impossible. If it can, the cargo is then practically capable of being sent in a marketable state to its port of destination, the master cannot sell it and the assured cannot recover as for a constructive total loss. And the same rule applies if a part only of the cargo can be saved. Per *Jervis, C. J.*, in *Rosetto v. Gurney*, 11 C. B. 186; sed vide *Gernon v. Royal Exchange Assurance Company*, Holt, N. P. 52; 6 Taunt. 383; 2 Marsh. 88; *Hudson v. Harrison*, 3 Brod. & Bingham 97; 6 Moore, 288.

Prima facie the assured on freight has a right of abandoning

freight where there has been a constructive total loss of ship. Per *Tindal, C. J.*, in *Benson v. Chapman*, 6 Mann. & Gr. 810. Thus if a vessel be captured or detained by arrest or embargo, and the assured on freight gives notice of abandonment, he may recover as for a total loss of freight if he bring his action before any freight is earned. *Thompson v. Rowcroft*, 4 East, 34.

But although a constructive total loss of freight may have taken place, and notice of abandonment may have been duly given, if the ship arrive earning freight before action brought, the assured cannot recover for a total constructive loss (*McCarthy v. Abel*, 5 East, 388); and if any freight be ultimately earned, it is immaterial whether it be the particular freight contracted for or not. *Everth v. Smith*, 2 Mau. & Selw. 278.

A mere retardation of the voyage will not give the assured on freight a right to recover as for a total loss, if it does not prevent the freight from being ultimately earned. *Ib.* See also *Barclay v. Stirling*, 5 Mau. & Selw. 6; *Brockelbank v. Sugrue*, 1 Mood. & Rob. 102. Nor will the loss be rendered total, by the fact that the freight when earned has been swallowed up by bottomry charges. *Benson v. Chapman*, 6 Mann. & Gr. 792; 5 C. B. 330; 2 H. L. Cas. 696.

The assured on freight will *prima facie* have a right to abandon on receiving intelligence of the loss or disability of the ship, but if the goods are transhipped, he

will be entitled to recover for a total loss in case the substituted ship does not arrive before action brought (2 Arn. Mar. Ins. 1141); *secus*, if the substituted ship arrives and the freight be earned before action brought. *Ib.*

When the ship and cargo are justifiably sold abroad, this will amount to a total absolute loss of freight, and no notice of abandonment will consequently be necessary; but when the ship is not justifiably sold, that is to say, where it could have been repaired or the cargo have been forwarded by another vessel, such notice is inoperative, for it has been well said that, "if the loss of freight be not total in its nature, abandonment cannot make it so." *Chapman v. Benson*, 5 C. B. 363; and see *Idle v. Royal Exchange Assurance Company*, 8 Taunt. 755; 3 Moore, 115; 3 Brod. & Bing. 151, n. (d); *Par-meter v. Todhunter*, 1 Campb. 541; *Green v. Royal Exchange Assurance Company*, 6 Taunt. 68; 1 Marsh. 447. Sed vide *Knight v. Faith*, 15 Q. B. 649.

The mere inability to repair a ship so as to send on the *entire* cargo by her will not amount to a constructive total loss of freight. Thus, in *Moss v. Smith*, 9 C. B. 94, a ship, valued at £12,000, was insured from Valparaiso to England. The freight, valued at £4000, was also insured by a separate policy. The ship having sailed with a full cargo, consisting of 800 tons of merchandise, was compelled, by stress of weather, to put back to Valparaiso, where the master, find-

ing, upon survey, that to repair her, so as to enable her to bring home the entire cargo, would cost a sum exceeding the value of the freight, though less than the value of the ship when repaired, sold her. It was held by the Court of Common Pleas not to be a total loss either of ship or freight. "The only loss in question here," said *Maule, J.*, "is a loss of freight as incident to the loss of the ship. If the ship was so irreparably damaged,—considering the damage to be irreparable in the view I have mentioned, and which I take to be well established,—to the extent that she could not bring home any part of the cargo, then that would be a total loss of freight. If the ship was damaged to such an extent only as that she might have been repaired so as to have been able to bring home part of the cargo, but not the whole, then there would be a total loss of that part of the freight which the ship was thus incapacitated from earning."

It is clear that there will be a total loss of freight if the cargo be so damaged by the peril of the sea in the course of the voyage as to render it impossible (except at an expense which would greatly exceed its value on arrival) to carry it to its port of destination. *Michael v. Gillespy*, 2 C. B. N. S. 627. See and consider *Mount v. Harrison*, 4 Bingh. 388; 1 Moore & P. 14.

3. *What is necessary in order to constitute a valid Abandonment.*—Where an absolute total loss takes

place, in which case, as we have before seen, no abandonment is necessary, the insurer will be entitled to whatever is ultimately saved, and it is termed "Salvage loss without notice of abandonment." Thus in the principal case, where the damaged hides had been sold at an intermediate port, Lord Abinger, C. B., said that "the proceeds of such sale would be considered as salvage, to the party who was to sustain the loss," i.e. the underwriter. *Ante*, p. 136.

When the assured receive intelligence of such a loss as entitles them to abandon, they have the option to treat the loss either as total or average. If they elect to treat it as a total loss, they must give notice of abandonment to the underwriters within a reasonable time (*Mitchell v. Edie*, 1 T. R. 608); and what is a reasonable time is a matter of law for the decision of the Court, and depends upon the peculiar circumstances of each case. *Hudson v. Harrison*, 3 Brod. & Bing. 106.

Where the assured has received certain intelligence of a disaster such as gives him a right to abandon (*Hunt v. Royal Exchange Assurance Company*, 5 Mau. & Selw. 47; *Aldridge v. Bell*, 1 Stark. 498; *Read v. Bonham*, 3 Brod. & Bing. 147; *Fleming v. Smith*, 1 H. L. Cas. 514), or of the ship's capture or detention in a foreign port (*Mullett v. Shedden*, 13 East, 304; *Mellish v. Andrews*, 15 East, 13), immediate notice of the intention to abandon must be given to the underwriters by the assured, with-

out waiting to see what will be the result.

The assured however cannot be expected to give notice until after he has had certain and accurate information of the disaster (*Read v. Bonham*, 3 Brod. & Bing. 147), and he is entitled to a reasonable time for acquiring a full knowledge of the state and nature of the damage done to the thing insured before he is bound to elect whether he shall abandon to the underwriters for a total loss or not, but he will not be allowed to lie by in order to ascertain, from *the state of the markets* or for any other reasons, whether it will be most for his benefit to treat the loss as total or partial. This is well laid down in the case of *Gernon v. The Royal Exchange Assurance Company*, 6 Taunt. 383. There a cargo of sugar had been insured from Liverpool to Calais, or the ship's port of discharge in the British Channel. The ship sailed on the 1st December, 1814, and meeting with tempestuous weather on the 20th, put back into Liverpool. On the same day, one of the owners there resident apprised his agent in London of her return, and that it was presumed there would be some damage from the sea-water. This was stated to the defendants on the 22nd. On the 21st, surveyors were employed to inspect the condition of the sugar. On the 24th the owners wrote that the cargo had been discharged, and was about to be surveyed, that from appearances the damage would not be equal to what they had

feared, and they requested the underwriters' permission to proceed to Havre, or to the ship's original destination. To this communication the defendants refrained from making any observation. On the 29th the owners again wrote for permission to go to a second port, and added, that after a minute inspection of the sugars, 290 boxes were found to have received damage, and that it was impossible to say how far the real injury might extend. On the 2nd of January, the defendants being applied to for instructions, declined giving any directions upon the subject of the damaged goods. On the 7th of January, the owners having obtained a formal protest and certificate of survey, and of the damage of the cargo, sent them to the defendants, adding, that by the latter it appeared that the greater part of the cargo was destroyed, and that the whole of it had suffered deterioration, insomuch that they could not think of sending any part of the cargo forward, and they signified to the insurers their intention of abandoning the whole, and that it would be brought to sale on a day named. At the trial, *Gibbs*, C. J., left to the jury the question whether the time which the plaintiff had taken for making the abandonment was longer than was sufficient for ascertaining and judging the state of the cargo; and the jury found that the assured had abandoned in a reasonable time, and found a verdict for the plaintiff. And the Court of Common Pleas

afterwards discharged a rule to set aside the verdict. "It is very true," said *Gibbs*, C. J., in delivering the judgement of the Court, "that the assured must always elect in the first instance whether he will consider a loss as partial, and take to the property himself, or as total, and abandon to the underwriter. This is the law in all cases where the assured has his election, by abandoning or not abandoning, to treat the loss as total or partial. But it is equally true that the first instance means, after the assured has had a convenient opportunity of examining into the circumstances which render abandonment expedient or otherwise, because it is on the result of that examination that he is to make up his mind whether he will abandon or not. Let it not be supposed that I accede to the proposition that the assured may use this latitude as an opportunity to judge of the state of the markets, and, as the markets fall or rise, to elect whether he will abandon or not abandon. He has no right to govern his conduct by any such rule. The only examination he may make is into *the actual state of the cargo*. . . . It was not competent to set up the abandonment on the 7th of January, if the assurers were fully apprised of the facts on the 29th of December; but I think it appears, from all the circumstances, that they were not so apprised on the 29th, and that the cargo had not then undergone so full an examination as was afterwards made. They ought to

have a reasonable and convenient time for their 'inspection;' if they had been dilatory in making their survey, it would have been a very different case, though the plaintiff ought not to be pressed too closely on this point; yet if he had been grossly negligent, and had slept over the business, I think it would have been an answer to the plaintiff's demand; but here is no unreasonable delay, and therefore we think there is no ground for saying the abandonment was made at too late a period." See S. C. 2 Marsh. Rep. 88; and *Hudson v. Harrison*, 3 Brod. & Bing. 106.

The assured will not be allowed to lie by and treat the loss as an average loss, and then afterwards give notice of abandonment to the underwriters because he finds it more to his advantage to treat the loss as total. Thus, in *Anderson v. Royal Exchange Assurance Company*, 7 East, 38, where a vessel laden with corn was stranded near Waterford on the 28th of January, and the vessel continued at high tide under water for near a month, during which time, from the 31st, the assured at low water were employed in saving the cargo, the whole of which was damaged, but the greater part recovered and kiln-dried. The assured did not give notice of abandonment to the underwriters until the 18th of February. It was held by the Court of Queen's Bench that the notice was not given in time. "It was not in fact," said Lord *Ellenborough*, C. J., "as it turned out, a total

loss; but during the time it was submersed in water it might have been treated as such. The assured however did not treat it as a total loss on their own account, but continued labouring on the vessel and cargo on their own account for some time afterwards, from the 31st of January till the 18th of February, and had succeeded in preserving part of it, and did not elect to abandon *till they found that it would not answer to keep to the cargo*; and when they did abandon, it was no longer in fact a total loss." And *Le Blanc*, J., tersely observed, "The assured must not take the chance of endeavouring to make the best of the accident for himself, and when he finds that it does not answer, then to abandon to the underwriters." See also *Allwood v. Henckell*, Park, 399; *Baker v. Blakes*, 9 East, 283; *Fleming v. Smith*, 1 H. L. Cas. 513.

Upon the same principle as is laid down in the principal case, the assured may preclude himself from recovering for a total loss, if, by any view to his own interest, he voluntarily does, or permits to be done, any act whereby the interests of the underwriter may be prejudiced in the recovery of the money arising from the sale of the property insured. And the learned Judge who decided that case gives as an illustration of the principle what was in reality decided in *Mitchell v. Edie*, 1 T. R. 608. "Suppose," he says, "that the money received from the sale should be greater than or equal to the

sum insured, if the assured allows it to remain in the hands of his agent, or of the party making the sale, and treats it as his own, he must take upon himself the consequence of any subsequent loss that may arise of that money, and cannot throw upon the underwriter a peril of that nature." *Ante*, p. 142. See also *Allwood v. Henckell*, Park, 399, 8th ed.

An abandonment cannot be partial, it must be of the whole thing insured (Smith's Merc. Law, 391, 6th ed.), and it must be absolute and unconditional (*M' Masters v. Shoobred*, 1 Esp. 238), and consequently a person who has not an absolute and unconditional right to the possession of the goods injured cannot make a valid abandonment. *Conway v. Gray*, 10 East, 536.

Although an abandonment is generally in writing, it may be by parol. *Parmeter v. Todhunter*, 1 Campb. 541; *Read v. Bonham*, 3 Brod. & Bing. 147, 149; but in either case it must be express and unequivocal. Thus, in *Parmeter v. Todhunter*, 1 Camp. 541, where the insurance-broker stated to the underwriters that the ship insured had been captured, recaptured, and taken into a foreign port, and required them to settle as for a total loss, and to give direction as to the disposition of the ship and cargo, it was held by Lord *Ellenborough*, C. J., that this did not amount to an abandonment. "There is," he observed, "no implied abandonment by a demand of a total loss. It would be very well to prevent parol abandonments entirely; but

if they are allowed, I must insist upon their being express. An implied parol abandonment is too uncertain and cannot be supported. The abandonment must be express and direct, and I think the word 'abandon' should be used to render it effectual." So likewise where a letter stating the damage done to a cargo insured was shown to the underwriters, and they desired that "the assured would do the best they could with the damaged property," Lord *Kenyon*, C. J., held that this did not enable the assured to go for a total loss. *Thellusson v. Fletcher*, 1 Esp. 73; see also *Lockyer v. Offley*, 1 T. R. 252; *Da Costa v. Newnham*, 2 T. R. 407; *Havelock v. Rockwood*, 8 T. R. 277. But it seems that the underwriters may by their conduct acquiesce, so as to be bound by an informal notice of abandonment. *Hudson v. Harrison*, 3 Brod. & Bing. 97.

Where notice of abandonment has been accepted by the underwriters it is irrevocable, even although the thing insured be restored before action brought (*Smith v. Robertson*, 2 Dow, P. C. 474); and their title to the thing abandoned will have relation back to the time of the alleged loss. *Cam-mell v. Sewell*, 3 Hurlst. & N. 617.

An acceptance of an abandonment may be either written or parol, or it may be inferred from the acts of the underwriters, without either a written or a verbal communication (*Hudson v. Harrison*, 3 Brod. & Bing. 97; 6 J. B. Moore, 288); but it should be distinct and unequivocal. *Thellusson v. Fletcher*,

1 Esp. N. P. 72. If the underwriters upon receiving notice of abandonment wish to dispute it, they should do so within a reasonable time; otherwise they will, by lying by, be held to have acquiesced in, and will consequently be bound by the notice. See *Hudson v. Harrison*, 3 Brod. & Bing. 97; *Smith v. Robertson*, 2 Dow, P. C. 474.

Abandonment may before its acceptance be revoked or waived by the act of the assured. No acts of the *master*, acting as agent for both parties with regard to the property insured, will have that effect (2 Arn. Mar. Ins. 1175, 2nd ed.); nor will the acts of the insured have that effect unless they unequivocally amount to acts of ownership. Thus, after notice of abandonment, a direction by the assured to a Government agent to sell a ship which had been recovered from a mutinous crew (the cargo having been previously sold) was held not to amount to a waiver of the notice. *Brown v. Smith*, 1 Dow, P. C. 349; and see *Allen v. Sugrue*, Dans. & Ll. 190, note (a); *Stewart v. Greenock Marine Insurance Company*, 2 H. L. Cas. 159.

4. *The Effects of Abandonment on the Rights and Liabilities of the Parties to the Contract of Insurance.*—The effect of an abandonment operates as an assignment to the insurers, except in the case of an abandonment of a ship where, in consequence of the Registry Acts, the abandonment does

not absolutely vest the ship in the insurers, for it enures only as a binding agreement to assign the ship, the assured in the meantime being trustees for the underwriters. *Scottish Marine Insurance Company of Glasgow v. Turner*, 1 Macq. H. L. Cas. 334, 242; *Stewart v. The Greenock Marine Insurance Company*, 1 Macq. H. L. Cas. 328, 331.

The thing insured, when thus transferred by abandonment to the underwriters, is termed the *salvage*; and hence it is that losses, which give the right of abandonment, are known, in Insurance law, as *salvage losses*, or *total losses, with benefit of salvage*. 2 Arn. Mar. Ins. 1179, 2nd ed.

The result of abandonment is that all incidents to the thing abandoned pass with it; thus any claims on account of damage arising from collision, caused by the fault of another ship, will pass to the underwriters, who may commence an action in the name of the assured. *Yates v. Whyte*, 4 Bing. N. C. 272; 5 Scott, 640. Upon the same principle it was held that underwriters who had paid a total loss on British ships captured by the Spaniards, were entitled as salvage to the proceeds of Spanish ships captured by way of reprisals, which had been distributed by the British Government amongst the assured. *Randal v. Cockran*, 1 Ves. 98. So where, after the abandonment of a ship, the assured on freight becomes entitled to be indemnified against its loss, the underwriters can claim

any other freight earned by the ship in her voyage, instead of that insured. *Green v. Royal Exchange Assurance Company*, 6 Taunt. 68; 1 Marsh. 447; and see *Everth v. Smith*, 2 M. & S. 278; *Brocklebank v. Sugrus*, 1 Mood. & R. 102.

Upon the same principle the freight pending at the time of the casualty or earned by a ship after abandonment will belong, not to the shipowner, but to the underwriters on ship. Thus, in *Stewart v. The Greenock Marine Insurance Company*, 1 Macq. H. L. Cas. 328, the 'Laurel' sailed from Quebec for Liverpool on the 14th of July, 1842. On the 27th of July she was damaged by an iceberg, but on the 11th of August was brought into the Mersey, where, on the receding of the tide, she took ground, and sustained further injury. Nevertheless, on the 12th of August, she was floated into dock, and moored. On the 13th or 14th of August she delivered her cargo, which consisted of timber, to the consignees, who duly made payment of the freight. The ship afterwards being found not worth repairing, was abandoned to the underwriters on ship. It was contended on behalf of the shipowners that they were entitled to the freight, inasmuch as it had been earned before the abandonment, and that a decision in favour of the underwriters would give to the abandonment a retrospective operation. The House of Lords however held that the underwriters were entitled to the freight. "In my view of the case," said

Lord Cottenham, C., "it is not material whether the total loss is to be considered as having been completed on the 27th of July or on the 12th of August, for the voyage was not completed at either of these two dates. It was indeed argued that the voyage had been completed at the latter date, and the freight earned at that time; *the freight was, in fact, subsequently earned by the delivery of the goods*, but at the last date to which the total loss can be referred, namely, the 12th of August, it had not been earned. . . . In all cases in which the subject is not actually annihilated, the assured is entitled to claim, and claiming as upon a total loss, must give up to the underwriters all the remains of the property recovered, together with all benefit and advantage belonging or incident to it, or rather such property vests in the underwriters. Now the freight which a ship is in the course of earning is a benefit or advantage belonging to it, and is as much to be given up to, or to become the property of, the underwriters paying for a total loss of ship, as any other matter of value belonging to or incident to the subject insured. It cannot be of importance at what part of the voyage the accident happens, and the property in the vessel is changed by what is accounted in law to be a total loss." See also *Samuel v. Royal Exchange Assurance Company*, 8 B. & C. 119; *Benson v. Chapman*, 6 M. & G. 792; 2 H. L. Cas. 721; *Case v. Davidson*, 5 M. & S. 79; 2 Brod. & Bing.

379; 5 J. B. Moore, 117; 8 Price, 542.

Where the owners of the ship and the cargo are *distinct* persons, and the freight is insured with one set of underwriters, and the ship with another, and a separate abandonment is made of each, the underwriters on ship will be entitled to the whole freight pending at the time of the casualty, and ultimately earned by the ship (*Case v. Davidson*, 5 M. & Selw. 79; 2 Brod. & Bing. 379; 8 Price, 542; *Stewart v. Greenock Marine Insurance Company*, 2 H. L. Cas. 159; see also *Luke v. Lyde*, 2 Burr. 882; *Thompson v. Rowcroft*, 4 East, 44), and the freight which becomes thus vested in the underwriter on ship cannot be recovered by the ship-owner from the underwriter on freight. Thus, in *The Scottish Marine Insurance Company of Glasgow v. Turner*, 1 Macq. H. L. Cas. 334, the owners of the ship 'Laurel' (as appears in the case first noticed of *Stewart v. The Greenock Marine Insurance Company*) having been compelled to surrender the freight received by them from the consignees of the cargo, instituted an action against the insurers on freight alleging, that as the underwriters on ship had been found entitled to the freight, it must be considered as lost to the assured, and consequently recoverable under the policy. It was held however by the House of Lords, reversing the decision of the Court of Session in Scotland, that the action was not maintainable. "Having regard," said Lord *Truro*,

"to the true construction of the policy,—in other words, the obligation of underwriters on freight,—the facts of this case appear to be conclusive against the claim of the respondents. The decision below however rests upon a different construction of the policy, and it therefore becomes necessary to examine that construction. The expression 'the loss of freight' has two meanings, and the distinction between them is material. First, freight may be lost in the sense that, by reason of the perils insured against, the ship has been prevented from earning freight; or, secondly, freight may be lost in the sense that, after it has been earned, the owner has been deprived of it by some circumstances unconnected with the contract between the assured and the underwriters on freight. For a loss of freight in the first sense, the underwriter on freight is liable; but for any loss of freight in the second sense, I conceive the underwriter is not answerable. I can extract no obligation whatever from the policy which should subject him to such a liability. He has performed his warranty, the freight has been earned, and he has no concern with the subsequent results. In the present case the owners received the freight on their own account, for their own benefit; and as the facts stood, when they so received it they were entitled to retain it against all the world. The contract between the owners and the underwriters on freight had been entirely performed, and the rela-

tion between them determined. The owners were then entitled to claim full compensation from the insurers of the ship for any pecuniary loss they might have incurred by reason of the damage their ship had sustained; but rather than thus claim as for a partial loss, they preferred to claim as for a total loss. The consequence of their electing to take that course was to make the freight which he had received for his own benefit an item in account between them and the insurers of the ship. Therefore the present claim against the insurers of the freight is founded, not on the policy for freight, but upon something else with which the insurers of the freight have nothing to do."

Where however the same person is the owner of the ship and cargo, no freight will, upon abandonment, pass to the underwriters on ship. See *Miller v. Woodfall*, 8 Ell. & Bl. 498. There a shipowner loaded his ship, which was bound for Liverpool, with goods on his own account, and he insured the ship and the freight of the goods by distinct insurances. The ship was stranded at Southport, on the English coast, about twenty miles from Liverpool. The shipowner abandoned the ship to the insurers on ship. After the abandonment, the shipowner, at his own expense, had a part of his goods taken out and conveyed by lighters to Liverpool, and he, at his own expense, procured assistance by which the ship, with the remainder of his goods on board, was brought

to Liverpool. Afterwards the assurers accepted the abandonment. On the assured claiming for the loss of the ship from the assurer, the assurer claimed credit for the freight of the goods of the shipowner. It was held by the Court of King's Bench that nothing in the nature of freight for the carriage of the shipowner's goods to Southport passed to the abandonees, but that they were entitled to an allowance for the carriage of the part of the goods from Southport to Liverpool in the ship after the abandonment, to be estimated at the current rate of freight as if brought from Southport to Liverpool in another ship. "If," said Lord Campbell, C. J., "the goods on board the ship at the time when the casualty to which the abandonment refers occurred had belonged to third persons, for whom they were to be carried on freight from St. John to Liverpool, there can be no doubt that, by our law, the right to the whole of that freight would have passed to the abandonees of the ship. . . . But in the case which we have now to decide, at the time of the casualty there was no freight pending. The goods in the ship were the property of the owner of the ship; he was carrying them on his own account, and he could have no contract with himself. As between him and the underwriter on ship, it was quite immaterial that, under the designation of freight, he had insured with other underwriters the increased value of his goods, by reason of their being carried

from St. John to Liverpool. Considering as a test what would have passed to the purchaser on a sale of the ship at the time of the casualty, it seems clear that he could have had no claim against the vendor in respect of the goods having been carried in the ship from St. John to Southport before the sale. No more can the abandonnee. At the moment of the casualty, the goods had become more valuable to the owner from being carried the greatest part of the voyage; and he might have sold them afloat at an increased price. This is rather analogous to the case of freight earned and received by the owner

of the ship before the abandonment, to which the abandonnee of the ship would have no claim. We are therefore of opinion that it is only for any benefit which the owner of the goods may have derived from the use of the ship subsequent to the casualty, that the abandonnees can claim compensation in the nature of freight."

As to the deductions made from freight ultimately earned before its proceeds are paid over as salvage to the different sets of underwriters, see *Sharp v. Gladstone*, 7 East, 24; *Barclay v. Stirling*, 5 Mau. & Selw. 6.

LEWIS v. RUCKER.

—◆—
Saturday, 2nd May, 1761.

[REPORTED 2 BURR. 1167.]

MARITIME INSURANCE—ADJUSTMENT OF AVERAGE.]—*The nature of the contract of insurance is, that the goods insured shall come safe to the port of delivery ; or if they do not, that the insurer shall indemnify the assured to the amount of the prime cost or value in the policy. If the goods arrive lessened in value through damage received at sea, the nature of the contract of insurance being a contract of indemnity requires that the insured should be put in the same condition (relation being had to the prime cost or value in the policy), which he would have been in if the goods had arrived free from damage,—that is, by paying such proportion or aliquot part of the prime cost or value in the policy, as corresponds with the proportion or aliquot part of the diminution in value occasioned by the damage.*

A RULE having been obtained by the plaintiffs (the insured) for the defendant (the insurer) to show cause why a verdict given for the defendant should not be set aside and a new trial had, the Court, after hearing the matter fully debated by counsel on both sides, took time to advise.

Lord MANSFIELD, C. J., now delivered their resolution, in doing which he stated everything requisite to be known in so full and ample a manner as to render it quite unnecessary, and even impertinent, for the reporter to pretend to prefix any preface or introduction to it. What he said was to the following effect. This was an action brought upon a policy, by the plaintiffs, for Mr. James Bourdieu, upon the goods aboard a ship called the 'Vrow Martha,' at and from St. Thomas Island to Hamburg, from the loading at St. Thomas Island till the ship should arrive and land the goods at Hamburg.

The goods, which consisted of sugars, coffees, and indigo, were valued at £30 per hogshead the clayed sugars, and £20 per hogshead the Muscovado sugars; and the coffee and indigo were likewise respectively valued. The sugars were warranted free from average under £5 per cent., and all other goods free from average under £3 per cent., unless the cargo of the ship be stranded.

In the course of the voyage the sea-water got in, and when the ship arrived at Hamburg, it appeared that every hogshead of sugar was damaged. The damage the sugars had sustained made it necessary to sell them immediately, and they were accordingly sold, and the difference between the price which they brought by reason of the damage and that which they might have been sold for at Hamburg, if they had been sound, was as £20. 0s. 8d. per hogshead is to £23. 7s. 8d. per hogshead, *i. e.* if sound, they would have been worth £23. 7s. 8d. per hogshead; as damaged, they were only worth £20. 0s. 8d. a hogshead.

The defendant paid money into Court by the following rule of estimating the damage. He paid the like proportion of the sum at which the sugars were *valued in the policy*, as the price of the damaged sugars bore to sound sugars at Hamburg, the port of delivery. All this was admitted at the trial, though perhaps, upon an accurate computation, there may be a mistake of about 17s. upon the money paid in, but no advantage was attempted to be taken of this slip at the trial. It was admitted that the money paid in was sufficient, if the rule by which the defendant estimated the loss was right, and the only question at the trial was, by what measure or rule the damage, upon all the circumstances of this case, ought to be estimated.

To distinguish this case, under its peculiar circumstances, out of any general rule, the plaintiff's counsel called Mr. Samuel Chollett, clerk to Mr. Bourdieu, who proved that upon the 15th of February (the time of the insurance), sugars were worth at London and Hamburg £35 a hogshead; that the proposals of a Congress to be holden, and the expectation of a peace, had on a sudden sunk the price of sugars; that before the ship arrived at Hamburg, and before he could know that the sugars had received any damage, Mr. Bourdieu had sent orders, "that the sugars should be housed at Hamburg, and kept till the price should rise above £30 a hogshead;" that he had many hundred hogsheads of sugar lying at Amsterdam, to which place he sent the like orders; that in fact the Congress not taking place, sugars rose £25 per cent.; that what he

sold of the sugars he had at Amsterdam brought £30 per hogshead and upwards; that he might have sold these sugars at the same price if they had been kept according to his orders, and the only reason why they were not kept was because they were rendered perishable from the sea-water which had got in. Therefore, said they, the necessity of an immediate sale and the consequence thereof ought to be computed with the damage.

The special jury (amongst whom there were many knowing and considerable merchants) found the defendant's rule of estimation to be right, and gave their verdict for him. They understood the question very well, and knew more of the subject of it than anybody else present, and formed their judgment from their own notions and experience, without much assistance from anything that passed.

The counsel for the plaintiff, in the outset, chiefly rested upon the particular circumstances of this case.

The counsel for the defendant offered to call witnesses to prove the general usage of estimating the quantity of damage where goods are injured.

I was struck with the argument, "that the immediate necessity of selling in this case might be taken into consideration, as an exception to the general rule," and proposed that the cause might be left to the jury upon that point. Then Mr. Winn, for the defendant, argued "the necessity of selling and the consequence thereof ought not to be regarded." And what he said had so much weight, that it very much changed my way of thinking.

There was nothing to sum up, but the jury asked whether I would give them any directions; I said I left it to them, "whether the difference between the sound and the damaged sugars at the port of delivery ought to be the rule," or "whether the necessity of an immediate sale (certainly occasioned by the damage) and the loss thereby should be taken into consideration." I told them, though it had struck me at first, that this case might be an exception, yet what the counsel for the defendant had said to the contrary seemed to have great weight.

The counsel for the plaintiff not having replied nor gone into the general argument, upon an apprehension that my opinion was with them upon the particular circumstances of this case, were dissatisfied with the verdict, and said they would try the other cause in the paper upon the same policy; but instead of that, they have moved for a new trial in this cause, which I am extremely glad of.

No fact is disputed. The only question is, "whether (all the facts being agreed) the jury have estimated the damage by a proper measure."

To make the matter more intelligible, I will first state the rule by which the defendant and jury have gone, and then I will examine whether the plaintiff has shown a better.

The defendant takes the proportion of the difference between sound and damaged goods at the port of delivery, and pays that proportion upon the value of the goods specified in the policy, and has no regard to the price in money which either the sound or damaged goods bore in the port of delivery. He says the proportion of the difference is equally the rule, whether the goods come to a rising or a falling market. For instance, suppose the value in the policy £30,—they are damaged but sell for £40, if they had been sound, they would have sold for £50,—the difference is a fifth. The insurer then must pay a fifth of the *prime* cost or value in the policy, that is £6. *E converso*, if they come to a losing market, and sell for £10, being damaged, but would have sold for £20 if sound, the difference is one-half; the insurer must pay half the *prime* cost, or value in the policy, that is £15.

To this rule, two objections have been made.

1st Objection. That it is going by a different measure in the case of a partial, from that which governs in the case of a total loss, for upon a total loss the prime cost or value of the policy must be paid.

Answer. The distinction is founded in the nature of the thing. Insurance is a contract of indemnity against the perils of the voyage. The insurer engages, so far as the amount of the prime cost, or value in the policy, "that the thing shall come safe." He has nothing to do with the market. He has no concern in any profit or loss which arise to the merchant from the goods; if they be totally lost, he must pay the prime cost, that is, the value of the thing insured at the outset. He has no concern in any subsequent value.

So likewise, if part of the cargo, capable of a several and distinct valuation at the outset, be totally lost, as if there be 100 hogsheads of sugar and 10 happen to be lost, the insurer must pay the prime cost of those 10 hogsheads, without any regard to the price for which the other 90 may be sold.

But where an entire individual, as one hogshead, happens to be spoiled, no measure can be taken from the prime cost to ascertain the quantity of such damage. But if you can fix whether it be a

third, fourth, or fifth worse, the damage is fixed to a mathematical certainty. How is this to be found out? not by any price at the outset port, but it must be at the port of delivery, where the voyage is completed and the damage known, whether the price there be high or low; in either case it equally shows whether the damaged goods are a third, a fourth, or a fifth worse than if they had come sound; consequently, whether the injury be a third, fourth, or fifth of the value of the thing. And as the insurer pays the whole prime cost, if the thing be wholly lost; so, if it be only a third, fourth, or fifth worse, he pays a third, fourth, or fifth of the value of the goods so damaged.

2nd Objection. The next objection with which this case has been much entangled, is taken from this being a *valued* policy.

I am a little at a loss to apply the arguments drawn from thence. It is said "that a valued is a *wager-policy* (like interest or no interest); if so, there can be no *average* loss, and the insured can only recover as for a *total* [loss], abandoning what is saved, because the value specified is fictitious."

Answer. A valued policy is not to be considered as a *wager-policy*, or like "interest or no interest." If it was, it would be void by the Act of 19 Geo. II. c. 37. The only effect of the valuation is *fixing* the amount of the prime cost, just as if the parties had admitted it at the trial. But in every argument, and for every other purpose, it must be taken that the value was fixed in such a manner as that the insured meant only to have an indemnity. If it be undervalued, the merchant himself stands insurer of the surplus; if it be much overvalued, it must be done with a bad view either to gain, contrary to the 19th of the late king (George II.); or with some view to a fraudulent loss. Therefore the insured never can be allowed in a court of justice to plead that he has greatly overvalued or that his interest was a trifle only.

It is settled that upon valued policies, the merchant need only prove *some* interest, to take it out of 19th Geo. II. c. 37, because the adverse party has admitted the value, and if more were required, the agreed valuation would signify nothing. But if it should come out in proof that a man had insured £2000, and had interest on board to the value of a cable only, there never has been, and I believe there never will be, a determination, that by such an evasion the Act of Parliament may be defeated. There are many conveniences from allowing valued policies, but where they are used merely as a cover to a *wager*, they would be considered as an evasion. The

effect of the valuation is only fixing conclusively the prime cost. If it be an open policy, the prime cost must be proved. In a valued policy it is agreed.

To argue that there can be no adjustment of an average loss upon a valued policy, is directly contrary to the very terms of the policy itself. It is expressly subject to average, if the loss upon sugars exceeds £5 per cent. If it was not, the consequence would be, that every partial loss must thereby become total; but the event, to entitle the insured to recover, would not happen unless there was a total loss. Besides the plaintiffs have taken to the goods, and sold them.

In opposition to the measure the jury have gone by, the plaintiffs contend that they ought to be paid the whole value in the policy, upon one of two grounds.

First. Because the general rule of estimating should be the difference between the price the damaged goods sell for, and the prime cost (or value in the policy). Here the damaged [sugar] sold at £20. 0s. 8d. per hogshead, and the underwriter should make it up £30.

Answer. It is impossible this should be the rule. It would involve the underwriter in the rise or fall of the market. It would subject him, in some cases, to pay vastly more than the loss; in others it would deprive the insured of any satisfaction, though there was a loss.

For instance, suppose the prime cost or value in the policy £30 per hogshead; the sugars are injured, the price of the best is £20 a hogshead, the price of the damaged is £19. 10s. The loss is about a fortieth, and the insurer would have to pay above a third. Suppose they come to a rising market, and the sound sugars sell for £40 a hogshead, and the damaged for £35, the loss is an eighth, yet the insurer would have to pay nothing.

The second ground upon which the plaintiff contends that the £30 should be made up, is, that it appears the sugars would have sold for that price, if the damage from the sea-water had not made an immediate sale necessary.

The moment the jury brought in their verdict, I was satisfied that they did right, in totally disregarding the particular circumstances of this case, and I wrote a memorandum at Guildhall, in my notebook, "that the verdict seemed to me to be right."

As I expected the other cause would be tried, I thought a good deal of the point, and endeavoured to get what assistance I could

by conversing with some gentlemen of experience in adjustments. The point has now been very fully argued at the bar, and the more I have thought, the more I have heard upon the subject, the more I am convinced that the jury did right to pay no regard to these circumstances. The nature of the contract is, that all goods shall come safe to the port of delivery, or if they do not, to indemnify the plaintiff the amount of the prime cost, or value in the policy. If they arrive, but lessened in value through damages received at sea, the nature of an indemnity speaks demonstratively, that it must be by putting the merchant in the same condition (relation being had to the prime cost, or value in the policy) which he would have been in if the goods had arrived free from damage; that is, by paying such proportion, or aliquot part of the prime cost, or value of the policy, as corresponds with the proportion or aliquot part of the diminution in value occasioned by the damage.

The duty accrues upon the ship's arrival and landing her cargo at the port of delivery. The insured has then a right to demand satisfaction. The adjustment never can depend upon future events or speculation. How long are they to wait? a week, a month, or a year?

In this case the price rose, but if the Congress had taken place, or a peace had been made, the price would have fallen. The defendant did not insure "that there should be no Congress or peace." It is true, Mr. Bourdieu acted upon political speculation, and ordered the sugars to be kept till the price should be £30 or upwards. But no private scheme or project of trade of the insured can affect the insurer. He knew nothing of it. The defendant did not undertake that the sugars should bear a price of £30 a hogshead.

If speculative destinations of the merchant, and the success of such speculations were to be regarded, it would introduce the greatest injustice and inconvenience. The underwriter knows nothing of them. The orders here were given after the signing of the policy. But the decisive answer is, that the underwriter has nothing to do with the price, and that the right of the insured to a satisfaction, where goods are damaged, arises immediately upon their being landed at the port of delivery.

We are of opinion that the plaintiffs are not entitled to have the price for which the damaged goods were sold, made up £30 per hogshead. And it seems to us as plain as any proposition in Euclid, that the rule by which the jury have gone is the right measure.

The rule must be discharged.

JOHNSON *v.* SHEDDON.

Wednesday, July 7th, 1802.

[REPORTED 2 EAST, 581.]

The rule by which to calculate a partial loss on a policy on goods by reason of sea-damage is the difference between the respective gross proceeds of the same goods when sound and when damaged, and not the net proceeds. It being settled that the underwriter is not to bear any loss from fluctuation of market or port duties, or charges after the arrival of the goods at their port of destination.

THIS case was very fully argued in Easter Term, 41 Geo. III., by Garrow, Parke, and Lawes, against the rule for a new trial, and by the Attorney-General and Gibbs, in support of it. It is unnecessary to detail the arguments, as the substance of them was so distinctly stated in the judgment of the Court, which was delayed till now, in consequence of a difference of opinion on the Bench while Lord Kenyon presided in the Court.

LAWRENCE, J. (in the absence of Grose, J.), now delivered the judgment of the Court.

This is a motion for a new trial of an action brought against the defendant, an underwriter, on goods on board a ship called 'The Carolina,' from Sicily to Hamburg, to recover a *partial* loss sustained by the plaintiff, by reason of the sea-water having damaged a cargo of brimstone and shumack; and upon a calculation by Mr. Oliphant, to whom it was referred by the parties to ascertain the loss sustained, it has been settled after the rate of £76. 7s. 4d. per cent. And the ground on which the new trial has been moved for is, that Mr. Oliphant has proceeded in his calculation upon a mistake, inasmuch as in estimating the loss he has taken for his foundation the difference between the *net* produce of what the goods have produced, and what they would have produced if sound; instead of the difference between their respective *gross* produces. Upon the fullest consideration that we have been able to give this

question (which has been depending a great while, and which was argued before Lord *Ellenborough* came upon the Bench, and who, if the case were to be argued again, would give no opinion, having been concerned in the cause when at the bar), my brothers *Grose* and *Le Blanc* agree with me in thinking there should be a new trial, and that the calculation is wrong. Some points are agreed on both sides; viz. that the loss is to be estimated by the rule laid down in *Lewis v. Rucker* (2 Burr. 1170), that the underwriter is not to be subjected to the fluctuation of the market; that the loss for which the underwriter is responsible is that which arises from the deterioration of the commodity by sea-damage; and that he is not liable for any loss, which may be the consequence of the duties or charges to be paid after the arrival of the commodity at the place of its destination. In *Lewis v. Rucker*, Lord *Mansfield* says, "Where an entire individual, as one hogshead, happens to be spoiled, no measure can be taken from the prime cost to ascertain the *quantum* of the damage; but if you can fix whether it be a third, a fourth, or a fifth worse, the damage is fixed to a mathematical certainty;" and this he says is to be done "by the price at the port of delivery." From hence it follows, that whatever price at the port of delivery ascertains, whether a commodity be a third, fourth, or a fifth the worse, is a price to which he alludes. And this deterioration will be universally ascertained by the price given by the consumer or the purchaser, after all the charges have been paid by the person of whom he purchases; or, in other words, by the difference of the gross produce, and not by the difference of the net produce. When a commodity is offered to sale by one who has nothing further to pay than the sum the seller is to receive, it is the quality of the goods which, in forming a fair and rational judgment, can alone influence him in determining him what he shall pay; he has nothing to do with what it may have cost the seller, and the goodness of the thing is the criterion which must regulate the price; for being liable to no other charges, he has only to consider its intrinsic value, and therefore if a sound commodity will go as far again as a damaged commodity, by having twice its strength, or by being in any other respect twice as useful, he will give twice the money for the sound that he will for the damaged, and so in proportion. To say that this is not the rule will be to assert, what I conceive it will be difficult to prove, that the market price of things is not proportioned to their respective values; and if it be, it is a means of ascertaining whether a commodity be a third or fourth or a fifth the worse by

any risk it may have met with, and the damage will be thereby ascertained in the degree pointed out in *Lewis v. Rucker*; and the underwriter who shall pay by this rule will pay such proportion, or aliquot part of the value in the policy, as corresponds with the diminution in value occasioned by the damage. Lord *Mansfield*, in laying down the rule, speaks of the *price* of the thing at the port of delivery as the means of ascertaining the damage; by which he must mean the *whole* sum which is to be paid for the thing. For the net proceeds are not the price, but so much of the price as remains after the deduction of certain charges. Lord *Mansfield* cannot mean the price before the mast, leaving the purchaser liable to the payment of further sums; for such payment is in effect but a *part* of the price; it is not an equivalent for the thing sold; for if the purchaser were not liable to the duties and charges, he would give as much more as the amount of those charges come to. The price of a thing is what it costs a man; and if, in addition to a sum to be paid before the mast, other charges are to be borne, that sum and the charges constitute the cost. It is not necessary that the whole price should be paid to one person. To taking the net proceeds to calculate by, there are several objections; one is, that by taking the net proceeds as the basis of the calculation instead of the gross proceeds, it will happen, where equal charges are to be paid on the sound and damaged commodity, that the underwriter will be affected by the fluctuation of the market, which he ought not to be. This is obvious, from considering that if you take equal quantities from two unequal quantities, the smaller such unequal quantities are, the greater will be the difference between the remainders; *e.g.* Suppose sound goods, including all charges, to sell for £600, damaged for £300, let the charges on each be £100, the difference after they are deducted will be £300, or three-fifths. But let the goods come to a fallen market with the same degree of deterioration, and let the sound sell for £300 and the damaged for £150, and deduct from each the charges, the net proceeds of the sound will be £200, and of the damaged £50, and the difference will be three-fourths. But as the deterioration is the same in both cases, the underwriter should pay the same, whatever be the state of the market; which he will do if the gross produce be taken *scil.* half the valued or invoice price. Another consequence of taking the net produce will be, that you will make the underwriter responsible for a loss not arising from the deterioration of the commodity by sea-damage; but for that loss which the assured suffers from being

liable to pay the same charges on the sound and damaged commodity. This will be illustrated by the case put of two ships arriving with the same commodity equally damaged; one being subject to duties and charges, and the other to none, the degree of deterioration being supposed the same, the underwriters should pay alike in both cases. Suppose then the cargoes to be deteriorated; that the demand for the commodity and the state of the market is the same; and that the goods if sound would sell for £1000, but being damaged, for £500, and the charges to be £200. On those goods where no charges are to be paid, the insurer will have to pay 50 per cent. The goods on which charges are to be paid, being equally good with the other, will sell in the market for the same sum, and when the charges are deducted, if sound, will produce £800; but being damaged, after the same deduction, will produce only £300, and according to that calculation, if the underwriter were to pay five-eighths instead of four-eighths or one-half; not because one cargo has suffered more than the other by the sea, for the supposition is, that the sea-damage is the same in both; but from commodities of unequal value being subjected to equal duties and charges. Suppose the same goods sold before the mast; a purchaser for those not liable to the duties would give exactly what he would give if there had been duties which the seller had paid; for as he has nothing further to pay to him, it is just the same, whether the seller had no charges to pay, or whether there were charges which he has paid; the commodity in the one case and in the other comes to the buyer's hands in the same state. But on these grounds, if liable to the further charges, he would give, if sound, but £800, as the duties he would have to pay would make the whole cost £1000, and if damaged and liable to the same charges, he could give but £300, for as he would be liable to pay £200 in charges, if he were to give above £300, the whole amount of what he would ultimately pay for the damaged goods would exceed their value, which by the supposition is but £500; he would therefore in this case give for the damaged less than in proportion to its degree of deterioration; for in giving £300 he would only give three-eighths instead of four-eighths, or a half; not because the damaged commodity is not half so good as the sound, but because on such damaged commodity he must pay as large charges as on the sound; and as this loss to the assured arises from a purchaser not being able to pay in proportion to the intrinsic quality of the commodity, it shows that a sale before the mast, when equal duties are to be paid, does not correspond

with the deterioration of the commodity, nor ascertain whether it be a third, fourth, fifth, or in what degree worse than the sound; consequently that the difference of the net produce cannot be the rule to calculate by, where the charges are not proportioned to the respective values of the sound and damaged commodity. Another objection is, that if the net produce be taken, it may happen that you can have no *data* to calculate by, which will be the case if the gross produce of the sound commodity should only pay the charges, and has no net proceeds, for then there can be no difference between the net proceeds of the sound and the damaged, in proportion to which it is contended that the underwriter is to pay. Upon the whole of this case it is our opinion that the rule should be absolute for a new trial.

Rule absolute.

FORBES AND ANOTHER v. ASPINALL.

Monday, Feb. 11th, 1811.

[REPORTED 13 EAST, 323.]

The valuation upon a freight policy is calculated upon all the goods the ship is intended to carry upon the voyage insured, and if by a peril insured against the ship be lost, when part only of the goods, the freight of which was intended to be covered, was on board, the valuation must be opened, and the assured can only recover as for that proportional share; as where freight valued at £6500 was insured on a ship from any port or ports in Hayti to Liverpool; and the ship, which had sailed with goods from Liverpool to Hayti on a voyage of barter, after exchanging a part of her outward cargo for fifty-five bales of cotton at the port of Hayti, proceeded with the same to another port, for the purpose of making a similar barter of the rest of the outward cargo, but was lost by a peril of the sea before it was effected; the assured was only entitled to recover for the freight of the fifty-five bales of the return cargo on board; though there was a moral certainty at the time, that the

remaining part of her outward cargo would, except for the loss, have been exchanged for a full return cargo; for shortly after the loss of the ship, the goods saved from the wreck were, in fact, exchanged for more produce than was sufficient to have covered the freight insured. But if there be a loss by a peril insured against of the whole subject-matter of the insurance to which the valuation applied, as of all the intended freight, where the insurance is on freight, the valuation in the policy will not be opened. And in an action on a freight policy, it seems sufficient to prove a contract under which the shipowner would have been intitled to demand freight if the voyage were not stopped by a peril insured against.

This case came before the Court upon a motion for a new trial in an action on a policy of insurance, in which the plaintiffs had recovered a verdict at the sittings after last Trinity Term at Guildhall. It was first moved in the last Term, when a rule to show cause was granted; and it was afterwards argued at length in the same Term by the *Attorney-General*, *Scarlet*, and *Richardson*, on the part of the plaintiffs, and by *Park* and *Littledale* for the defendant. The Court took till this Term to consider of their judgment; in delivering which the Lord Chief Justice went so fully into the arguments urged, and the cases cited at the bar, that it is unnecessary to repeat them.

The insurance, as it concerned this case, was on freight valued at £6500 upon the ship 'Chiswick,' "at and from any port or ports in Hayti to Liverpool, or her port of discharge in the United Kingdom." The declaration alleged that on the 9th of July, 1808, the ship was in safety in a certain port in Hayti, and that divers goods and merchandises were then and there loaded on board to be carried on the voyage insured; that the plaintiffs were interested in the freight, etc., to the amount insured; and that on the 15th of July the ship, with the goods on board, was lost by the perils of the seas, and the plaintiffs thereby lost their freight, etc.

The facts proved and admitted were, that the plaintiffs were the owners of the ship 'Chiswick;' that she sailed from Liverpool with the goods to Hayti to trade there, and to bring home a return cargo of produce, and arrived at Hayti on the 4th of July, 1808, with goods to be there bartered for other goods to be brought back to Liverpool. Part of the goods were accordingly bartered and exchanged for fifty-five bales of cotton, which were shipped on board at Jaquemel (on the south side of Hayti); the remaining part of her

outward cargo was still on board, and would, in all probability, have been exchanged for other goods, but for the loss after-mentioned. That the ship proceeded from Jaquemel to Au Cayes, another port of Hayti, to barter away the residue of her outward cargo, and to complete her lading home; and with such cargo and fifty-five bales on board, was in safety on the 15th of July, when, by the perils of the seas, she was driven on shore and lost. That the defendant settled for the freight of the fifty-five bales of cotton, without prejudice to the plaintiff's claim for further loss of freight, if they were entitled to it.

That the remaining part of the outward cargo, though damaged, was saved from the wreck, and, in twelve days after the loss of the ship, were exchanged for 250 tons of coffee and 100 tons of wood, the freight of which would have been of larger value than the sum insured on freight, if the ship had not been lost.

Lord ELLENBOROUGH, C. J., now delivered the judgment of the Court.

This was a motion for a new trial in an action upon a policy of insurance "at and from any port or ports in Hayti to Liverpool," etc., on *freight valued* at £6500. The ship had sailed from Liverpool to Hayti with a cargo intended for barter; had bartered away part of her outward cargo, and taken in fifty-five bales of cotton in part of her return cargo; and was proceeding from one port of Hayti to another, viz. from Jaquemel to Au Cayes, to barter away the residue of her outward cargo, and to complete her lading home, when she met with an accident by the perils of the sea which occasioned a total loss. If the plaintiffs be only entitled to a satisfaction for a partial loss, that satisfaction has already been made, and a nonsuit should be entered. But the plaintiffs contend, that as this was a valued policy, and as part of the goods to be carried upon the freight insured were on board at the time of the loss, they are entitled to claim their verdict for a total loss.

Freight is the profit earned by the shipowner in the carriage of goods on board his ship; and an insurance upon freight is an insurance made in order to secure that profit to the shipowner, in case he is prevented by any of the perils insured against from actually earning such profit.

An insurance upon *freight* has no reference to the *hull* of the ship, or to its outfit for the voyage, both of which are protected by insurance upon the *ship*; but its sole object is to protect the

assured from being deprived, by any of the perils insured against, of the profit he would otherwise earn by the carriage of goods. To recover, therefore, in any case upon a policy on freight, it is incumbent on the assured to prove, that unless some of the perils insured against had intervened to prevent it, some freight would have been earned; and where the policy is open, the actual amount of the freight which would have been so earned limits the extent of the underwriter's liability. In every action upon such a policy evidence is given, either that the goods were put on board, from the carriage of which freight would result, or that there was some contract under which the shipowner, if the voyage were not stopped by the perils insured against, would have been entitled to demand freight: and in either case, if the policy be open, the sum payable to the shipowner for freight, together with premiums of insurance and commission thereupon, is the extent to which the underwriters are chargeable. In this case, therefore, as there was no contract under which the shipowner could claim freight, but for goods actually shipped on the homeward voyage, the assured could have made no claim, had this been an open policy, but to the extent of the actual freight on the fifty-five bales of cotton which were shipped for this country, and of the premiums and commission thereon. And indeed that point has been settled against this very plaintiff, in an action on an open policy on this very risk, in *Forbes and another v. Cowie*, in Mr. Park's Addenda to the last edition, p. 604. The question then is, whether it makes any essential difference that this is the case of a *valued* policy? And we are of opinion, upon full consideration, that it does not. The object of valuation in a policy is to fix, by agreement between the parties, an estimate *upon the subject insured*, and to supersede the necessity of proving the actual value, by specifying a certain sum as the amount of that value. In fixing that sum, if the assured keep fairly within the principle of insurances, which is merely to obtain an indemnity, he will never go beyond the first cost in the case of the goods, adding thereto only the premium and commission and, if he think fit, the probable profit; and in the case of freight, he will not go beyond the amount of what the ship would earn, with the premiums and commission thereupon. The valuation, however, in the case of goods, looks to *all the goods* intended to be loaded; and in the case of freight, it looks to *freight upon all the goods* the ship is intended to carry upon the voyage insured; and if by the perils insured against in a valued policy on goods, *part* only of the goods intended

to be covered be lost, the valuation must be opened, and the assured can only recover in respect of *that part*; and so, if by the perils insured against, the *freight of part only* of the goods to be carried be lost, the assured can only recover in respect of that loss, according to the proportion which that part bears to the whole sum at which the entire freight was estimated in the valuation. If, for instance, the insurance be generally upon goods, and the goods intended to be protected be 500 hogsheads of sugar, and a valuation be made accordingly, but the ship by accident takes on board 100 only, and sails, and is afterwards lost by one of the perils insured against with those 100 on board, can it be contended that the assured shall recover to the full amount of the valuation, that is, for the whole 500, when he has lost only 100? So in the case of freight; if the ship would carry 500 tons, and in fixing the valuation the assured calculates his freight upon 500 tons, but when he reaches the loading port he can get 10 tons only upon freight, and sails upon the voyage insured with those 10 tons only; is it to be allowed, that if the ship be lost by any of the perils insured against, and he thereby lose freight upon 10 tons, he shall be entitled to the valuation which includes the freight upon 500 tons? And yet, to this extent the plaintiff's argument in this case is carried. The proposition is monstrous; instead of confining the policy, as it ought to be confined, to a contract as nearly as may be of indemnity, against what may be lost in respect of freight by the perils insured against, it converts it into a contract of indemnity against a different class of accidents, which may operate to prevent the assured from being able to procure a full cargo upon freight, and may make it the interest of the assured, which it never ought to be, that a loss should happen. The Court therefore will look for very strong authorities before they yield to such a proposition.

It was pressed, upon the argument, that in the case of a valued policy, if any interest be proved to be on board, and there be no fraud, a total loss will entitle the assured to recover the sum specified in the valuation. And to that position we accede, with this limitation, that is, provided there is a total loss, by any of the perils insured against, *of the whole subject-matter of insurance to which the valuation applied*, viz. of *all* the intended cargo of goods, where the insurance was on goods; and of *all* the intended freight, where the insurance was upon freight. But if he meant to carry that position to this extent, that the underwriter is not at liberty to inquire *what was intended* to have been included in that valuation;

or when he has ascertained that point, that he cannot reduce the sum below the valuation, by proving that *a part only* of what was included in the valuation has been lost by a peril insured against; we deny the position when so extended. In *Shaw v. Felton*, 2 East, 109, which has been strongly relied upon, the interest of the assured was in ship and outfit, including provisions and sea stores laid in for slaves, and wages advanced to the crew: and the chief ground insisted upon for opening the policy was this, that the principal part of the provisions had been consumed in the voyage, and therefore had not been lost by the perils insured against. But that ground was resisted with effect, because the subject insured was to be considered as of the value *ascribed to it when the voyage commenced*; and if the diminution of the provisions were to be allowed to reduce the extent of the underwriter's liability upon the policy, every valued policy upon the ship would be opened; because every day, after the voyage commenced, the quantum of the ship's provisions would be proportionably reduced. Mr. Justice *Lawrence*, in the opinion he gave, intimated distinctly, that upon an *open* policy such a diminution would not have varied the underwriter's liability. That case, when examined, does not appear to have proceeded altogether, if at all, upon a distinction between *valued* and *open* policies; it was not decided upon the ground that if *part only* of the subject intended to be covered by the policy, and included in the valuation, were lost by the perils insured against, the policy could not be opened, and the liability of the underwriters apportioned; but upon this ground merely, viz. that in the case of an insurance upon ship and outfit, if a total loss of ship occurred by a peril insured against, no deduction was to be made for provisions, etc., expended in the voyage before the loss occurred, or for the deterioration of the ship during that time; but that the underwriters were to be answerable for the original value, estimated in whatever manner such original value might be, as though the loss had occurred the instant after the policy attached. Indeed, where a loss occurred before any freight is earned, it would be unjust not to charge the underwriters to that extent, because by the event it has become of no avail to the assured, that the provisions have been expended, and the ship used; and that case, as applied to the present, only decides that the underwriter is chargeable to the same extent. The only remaining case relied upon by the plaintiffs, which is material to be considered, is that of *Montgomery v. Egginton*, which is shortly reported in 3 Term Rep. 362. That was an action

on freight valued at £1500. Freight to the amount of £500 only was on board when the ship was lost; but goods to the amount of the rest of the freight were ready to be shipped, and were lying on the quay for that purpose at the time. Lord *Kenyon* told the jury that if this were a *bond fide* transaction, and not a mere colourable insurance and a gaming policy, the assured was entitled to recover for the whole value in the policy. The jury gave a verdict for that sum: and though a rule *nisi* for setting aside the verdict was obtained, yet the opinion of the Court being strongly against the rule, it was afterwards abandoned. The grounds of this decision between valued and open policies is not expressly stated: and it might be that upon an *open* policy in such a case, Lord *Kenyon* and the Court might have thought that the assured would have been entitled to recover in respect of the freight on the goods on shore, as well as for the freight of those that were actually put on board. There might be circumstances in that case which would have entitled the shipowner to full freight, had the owners of the goods on shore refused to let them be shipped, and the ship had sailed with that part only which she had on board; there might have been a contract for giving the ship a full loading; or it might have been considered (though it is difficult to suppose that it was) that, as the residue of the goods to complete a cargo was ready to be shipped, and lying on the quay for the purpose, it was the same to the assured as if they really had been shipped. If that case, however, is to be considered as having decided that upon a policy estimating the freight upon a *full* cargo at £1500, a loss by a peril insured against may be recovered to that extent, when a third only of a cargo is obtained, and freight to the amount of such third could only have been earned, and when it was uncertain whether none ever could have been procured, we should pause long before we allowed ourselves to adopt such a ground of decision; we should hesitate extremely before we should say that £1500, the calculated amount of the whole intended risk, should be paid for a loss of £500 incurred in respect of a third of the intended risk; in other words, that a *total* loss should be paid for a loss of *only one-third* of that which the parties to the insurance contemplated as *the whole subject insured*. It is sufficient however to say, that that case is distinguishable from this in many of its circumstances. There a full cargo was ready to be laden, and the ship in a state ready to receive it, and nothing but the perils insured against did or (as appears) could prevent its being received; here it was uncertain whether

any additional cargo could have been ever procured, and the outward cargo must also have been discharged before the homeward cargo could have been completed; so that the ship was not ever in a condition to receive her homeward cargo, if the cargo had been ready, which it never was, to have been put on board. In a case, therefore, circumstanced as this is, where the valuation was with reference to freight upon a *complete* cargo; where a complete cargo, or anything like a complete cargo, never was in fact obtained, and for all that appears never might have been obtained; where there was no contract by any person to load a complete cargo, or pay dead freight, but the ship was a mere seeking ship; we cannot feel ourselves warranted in saying that there has been a *total* loss, by any peril insured against, of that which the insurance was intended to cover, and which the valuation contemplated, viz. *freight upon a complete cargo*; but are obliged to pronounce, that no loss by the perils insured against is made but beyond the loss of freight upon part of a cargo only, viz. upon fifty-five bales of cotton; that the assured are therefore not entitled to recover a total loss, but an apportionment only, according to the measure of their actual loss; and as that apportionment has been already allowed to the plaintiffs, that there must be a new trial case.

Lewis v. Rucker, *Johnson v. Sheddon* (generally known at Lloyd's as the *Brimstone Case*) and *Forbes v. Aspinall*, are always cited as leading authorities upon the mode of the adjustment of average. They are all worthy of an attentive perusal, and in particular the judgment in *Johnson v. Sheddon*, which has been stated by an eminent author to be "one of the ablest ever delivered in Westminster Hall." 2 Arn. Mar. Ins. 985, 2nd ed.

The principle upon which the underwriters' liability to make good a loss, whether total or par-

tial, is well stated by Lord Mansfield, C. J., in *Lewis v. Rucker*. It depends upon the nature of the contract of insurance which is a contract of indemnity against the perils of the voyage, "the insurer engages, so far as the amount of the *prime cost*, or *value* in the policy, 'that the thing shall come safe,' he has nothing to do with the market." *Ante*, p. 177.

In the case of a *valued* policy, the valuation in the policy is the agreed standard; in the case of an *open* policy, the invoice price at the loading port, including premiums of insurance and commis-

sion, is for all purposes of either total or average loss, the usual standard of calculation resorted to for the purpose of ascertaining this value. Per Lord *Ellenborough*, C. J., in *Usher v. Noble*, 12 East, 646.

Suppose, for instance, in a valued policy the goods were valued in the policy of insurance at £1000: if there were a total loss, the underwriters would be liable, pursuant to their own agreement, to pay £1000 to the insured; nor could they, except in the case of a fraudulent overvaluation, an instance of which is given by Lord *Mansfield*, C. J., in *Lewis v. Rucker* (see *ante*, p. 178), require the assured to prove the actual value of the subject-matter of the insurance (*Shawe v. Felton*; 2 East, 109; *Marshall v. Parker*, 2 Campb. 69; *Haig v. De la Cour*, 3 Campb. 319; *Feise v. Aguilar*, 3 Taunt. 506; *Irving v. Manning*, 1 H. L. Cas. 287; 6 C. B. 391; 2 C. B. 784); and it is immaterial that the subject-matter of the insurance is diminished in value, as in the case of a ship, by wear and tear, when lost at the end of a long voyage. *Shawe v. Felton*, 2 East, 109.

In the case of a total loss, where there has been no valuation of the goods, suppose the prime cost of the goods to be £1000, the premiums of insurance to be £50, and commission to be £20, the insurers upon a total loss of the goods would be liable to pay £1070 to the insured. See *Usher v. Noble*, 12 East, 646; *Tuite v. Royal Exchange Assurance Company*, Park, 224, 225, 8th ed.

In the case of a *partial* loss, as where the goods have been depreciated in value by damage at sea, there is greater difficulty in determining what is the liability of the underwriter, for the measure of the loss cannot be fixed alone either by the *prime* cost or the *value* in the policy. However, the *prime* cost in the case of an *open* policy and the *sum fixed* in the case of a *valued* policy, if the loss be partial as well as if it be total, is the *standard* by which the liability of the insurers is to be ascertained. The proportion of loss however is calculated through another medium, namely, by comparing the selling price of the sound commodity with the damaged part of the same commodity at the port of delivery. The difference between these two subjects of comparison affords the proportion of loss in any given case, *i. e.* it gives the aliquot part of the original value, which may be considered as destroyed by the perils insured against, and for which the assured is entitled to be recompensed. When this is ascertained, it only remains to apply this liquidated proportion of loss to the standard by which the value is calculated, *i. e.* in the case of a valued policy, to the value in the policy; and in the case of an open policy, to the invoice price, calculated as we have before stated; and then we get the one-half or one-fourth or one-eighth of the loss to be made good in terms of money. See *Usher v. Noble*, 12 East, 647.

This rule is equally applicable whether the goods come to a rising

or a falling market. To take an instance given by Lord *Mansfield* in the principal case of *Leavis v. Rucker*:—Suppose the value of the goods in the policy be £80; they are damaged, but sell for £40, but if they had been sound they would have sold for £50; the difference between the two latter sums being one-fifth, the insurer must, according to the rule before laid down, pay a fifth of the prime cost or value in the policy—that is £6. Suppose, on the other hand, they come to a losing market, and sell for £10 being damaged, but would have sold for £20 if sound, the difference is one-half; the insurer must pay one-half the prime cost, or value in the policy—that is £15." *Ante*, p. 177.

This rule of calculation, in the case of an open policy, is generally favourable to the underwriter, as the invoice price is less in most cases than the price at the port of delivery; but the assured may obviate this inconvenience by making his policy a valued one, or by stipulating that, in case of loss, the loss shall be estimated according to the value of like goods at the port of delivery. In the absence however of any express contract on the subject, the general usage of the assured and underwriters supplies the defect of stipulation, and adopts the invoice value, with the additions before mentioned, as the standard of value for this purpose. Per Lord *Ellenborough*, C. J., in *Usher v. Noble*, 12 East, 647.

The assured, if he wish to keep fairly within the principle of in-

surances, which is merely to obtain indemnity, ought in the case of goods never to go beyond the first cost, adding thereto only the premium and commission, and if he see fit, the probable profit; and in the case of freight, he ought not to go beyond the amount of what the ship would earn, with the premiums and commissions thereupon. *Forbes v. Aspinall*, *ante*, p. 188.

After the rule was laid down in *Lewis v. Rucker*, as to the mode of adjusting particular average on goods, a question before in dispute was finally settled in the principal case of *Johnson v. Shedden*, viz. that the difference between the respective gross proceeds of the sale of sound and damaged goods, and not the net proceeds, was to be taken for the purpose of calculating a partial loss on a policy. "Lord *Mansfield*, in laying down the rule in *Lewis v. Rucker*," observed the learned Judge, "speaks of the price of the thing at the port of delivery as the means of ascertaining the damage, by which he must mean the whole sum which is to be paid for the thing; for the net proceeds are not the price, but so much of the price as remains after the deduction of certain charges. Lord *Mansfield* cannot mean the price before the mast, leaving the purchaser liable to the payment of further sums. For such payment is in effect but a part of the price: it is not an equivalent for the thing sold; for if the purchaser were not liable to the duties and charges, he would give as much more as the amount

of those charges come to. The price of a thing is what it costs a man; and if, in addition to a sum to be paid before the mast, other charges are to be borne, that sum and the charges constitute the cost." *Ante*, p. 183. The learned Judge afterwards goes on, with the most cogent and conclusive reasoning, to show the objections to taking the net proceeds as a basis for the calculation, for which the reader is referred to the report, *ante*, p. 183. See *Hurry v. The Royal Exchange Assurance Company*, 3 Bos. & Pull. 308.

Where, in an action on a policy of insurance, the jury found a verdict for an average loss, subject to a reference to determine its amount, the Court would not grant a new trial, on the ground that it should have been left to the jury to determine whether the expenses of the sale of the damaged cargo should be borne by the underwriters or not, as that fact was in the discretion of the arbitrator, by whom the amount of the loss was to be ascertained. *Hudson v. Majoribanks*, 7 Moore's Rep. 463.

Where, in the case of a valued policy, only a *part* of the intended cargo is on board at the time of a total loss, the underwriters will only have to pay the same proportion of the valuation in the policy as the goods lost bear to the whole intended cargo. Thus, in *Rickman v. Carstairs*, 5 B. & Ad. 651, where a considerable proportion of the intended homeward cargo was not shipped at the time of a total loss, and the part shipped was not equal

to the value put on the goods in the policy, it was held by the Court of King's Bench that the valuation was opened, and that, although the part shipped of the homeward cargo, together with a part of the outward cargo then remaining on board, made up the amount named in such valuation, the assured could recover only a proportion estimated on the part of the homeward cargo shipped at the time of the loss.

The same principle is applicable in the adjustment of particular average on a continuing policy. Thus, in *Crowley v. Cohen*, 3 B. & Ad. 478, an insurance was effected for twelve months upon goods on board of thirty boats named, plying backwards and forwards between London and Birmingham, for £12,000, as interest might appear thereafter. A loss having been sustained by the sinking of one of the boats, whereby the goods on board were damaged, it was held by the Court of King's Bench that the assured was entitled to recover that proportion of such loss which £12,000 bore to the whole value of the goods afloat at that time, and not the proportion of £12,000 to the whole amount carried during the year.

In the case of a ship, as well as in the case of goods in *valued* policies, except where there has been fraud (*Shawe v. Felton*, 2 East, 109; *Haigh v. De la Cour*, 3 Campb. 319), and in *open* policies the value of the ship at the commencement of the risk forms the standard by which the adjustment of

particular average takes place. It may be here mentioned that the value of the ship in the latter case means "what she is worth to her owner at the port where the voyage commences, including all her stores, outfit, and money advanced for seamen's wages, the whole covered with the premium and costs of the insurance." 2 Arn. Mar. Ins. 995; Stev. Average, 190, 5th ed.

"The rule in adjusting a particular average loss on a ship," says a learned writer, "is very simple, viz. that in *open* policies the underwriter pays the same aliquot part of the sum he has agreed to insure as the damage, or the expense of repairing it, is of the ship's value at the commencement of the risk; in *valued* policies he pays the same proportion of the valuation in the policy. Thus, suppose in an open policy an underwriter has insured £1000 on a ship, the insurable worth of which is proved to have been £2000 at the outset of the risk, but whose value is reduced, by wear and tear of the voyage, etc., to only £1500 at the time of loss; then if a particular average loss takes place amounting to £500, as that sum is one-fourth of £2000, the ship's insurable value at the outset, the underwriter pays the same proportionable amount, or one-fourth of £1000, the sum he has insured, viz. £250." 2 Arn. Mar. Ins. 995, 2nd ed.

Where the damage done to a ship has been repaired, one-third will be deducted from the whole expense, both of labour and materials, which the repairs have cost,

leaving the remaining two-thirds as the amount of damage. "This deduction," says Lord *Tenterden*, "is founded upon the supposition, that there is a difference between new and old materials, and to avoid discussion in each particular case." *Fenwick v. Robinson*, 3 C. & P. 324; *Da Costa v. Newnham*, 2 T. R. 407; *Poingdestre v. Royal Exchange Assurance Company*, Ry. & Moo. 378.

This rule however is not absolutely universal, for if the loss happens on a first voyage, the underwriter is not entitled to the deduction. Per Lord *Tenterden*, C. J., in *Fenwick v. Robinson*, 3 C. & P. 324.

As to what is to be considered a first voyage, see *Fenwick v. Robinson*, 3 C. & P. 324; S. C., *Danson & Lloyd*, 8; *Pirie v. Steele*, 2 Mood. & Rob. 49; 8 C. & P. 200.

Upon its being stated, in evidence in a case before Lord *Abinger*, C. B., that the Marine Insurance Company deduct no thirds *unless the ship was eighteen months old*, his Lordship observed that "it was the most sensible rule, and much more certain than the rule of the first voyage, which might be either very long or very short." *Pirie v. Steele*, 8 C. & P. 202. See *Thompson v. Hunter*, 2 Mood. & Rob. 51, cited.

Where the owner has been unable to regain the ship through the default of the underwriters, as by their refusing to pay a bottomry bond for the costs of repairs ordered by them, there will be no deduction of one-third new for old,

because the insured has derived no benefit from the repairs (*Da Costa v. Newnham*, 2 T. R. 407); but where the default of the assured has been the cause of his not regaining the vessel, it has been decided in the United States that the usual deduction will be made. *Humphreys v. Union Insurance Company*, 3 Mason's Rep. 429.

As to when thirds or other proportions will be deducted, in respect of other parts of the ship's furniture, see 2 Arn. Mar. Ins. 1000.

Where expenses have been actually incurred in the repairs of a ship in her port of distress, and she is totally lost before reaching her port of destination, the cost of such repairs may be recovered in addition to the total loss, either as an average loss or as money expended and labour bestowed about the defence, safeguard, and recovery of the ship (*Le Cheminant v. Pearson*, 4 Taunt. 367); but although a vessel may have sustained an average loss, if no expenses have been actually incurred in repairing it, the assured cannot recover anything for the average loss in addition to the subsequent total loss. See *Stewart v. Steele*, 5 Scott, N. R. 927. There a vessel, being damaged by a collision, returned to her port of departure and was recoppered, and having sailed again, was compelled to return, and was put into dock and her wales were removed for the purpose of examining the condition of her timbers. Ultimately the vessel was found to be so defective as to

render it inexpedient to repair her, and she was consequently sold as she lay (the wales not having been replaced), for the purpose of being broken up. It was held by the Court of Common Pleas that the assured was entitled to recover the cost of the recoppering in addition to a total loss, but that he was not entitled to recover anything in respect of the expense which might have been, but which was not incurred in replacing the wales. So, in the case of *Livie v. Janson*, 12 East, 648, where an American vessel was insured warranted against American condemnation: after she had sailed on her voyage she sustained damage, which had it been repaired would undoubtedly have fallen upon the underwriters. She was not repaired, and afterwards, being ashore in the St. Lawrence, was captured by the Americans. It was held that the underwriters were not responsible. "There may be cases," said Lord *Ellenborough*, C. J., "in which though a prior damage be followed by a total loss, the assured may nevertheless have rights or claims in respect of that prior loss which may not be extinguished by the subsequent total loss; actual disbursements for repairs in fact made, in consequence of injuries by perils of the seas prior to the happening of the total loss, are of this description; unless indeed they are more properly to be considered as covered by that authority with which the assured is generally invested by the policy of 'suing, labouring, and travelling,

etc., for, in, and about the defence, safeguard, and recovery of the property insured; in which case the amount of such disbursements might more properly be recovered as money paid for the underwriters under the direction and allowance of this provision of the policy, than as a substantial average loss to be added cumulatively to the total loss which is afterwards incurred in consequence of the sea-risks. In the present case, as the immediately operating cause of total loss was one from which and its consequences the defendant is by express provision in the policy exempted; and as the other antecedent causes of injury never produced any pecuniary loss to the plaintiff; and as there never existed a period of time prior to the total loss in which the assured could have practically called on the underwriters for an indemnity against the temporary and partial injury sustained by the property insured; we are of opinion that such prior partial injury forms in this case no claim upon the underwriters of this policy."

The assured will however be entitled to recover for a partial loss, although no expense has been incurred in repairing it, where it has been followed by an improper sale of the ship, in a case held not to amount to a total loss. *Knight v. Faith*, 15 Q. B. 649.

In cases of the adjustment of partial loss on freight, where the sum insured, or the valuation in the policy, is less than the value of the interest at risk, the underwriter

pays the same proportional part of the loss that the sum insured, or the valuation in the policy, is of the value of the freight; if the sum insured, or the valuation in the policy, equals the value of the interest, then he pays the whole loss. 2 Arn. Mar. Ins. 1004, 2nd ed. Where only part of the full cargo included in the valuation is on board or contracted for at the time of the loss, the underwriter will only be liable to pay upon such proportion of the value in the policy, as the part of the cargo on board or contracted for at the time of the loss bears to the full intended cargo. See the principal case of *Forbes v. Aspinall*, ante, p. 185.

The general principle of insurance, that the insured shall, in case of a loss, recover no more than an indemnity, has been departed from in the case of the insurance by an open policy on freight, with regard to which it has been decided, upon the usage of trade, that in case of loss, it shall be adjusted on the gross and not on the net amount of the freight. See *Palmer v. Blackburn*, 1 Bing. 61. There it appeared that the ship 'Juliana,' bound from the East Indies to London, was totally lost just before the termination of her voyage. The freight payable to the plaintiffs in the event of the safe arrival of the ship would have been £8068, but out of this the plaintiffs must have paid £699. 9s. for seamen's wages, pilotage, light dues, tonnage duty, and dock dues; from which payment they were altogether exempted by the loss of the vessel. It

was held by the Court of Common Pleas, refusing a rule for a new trial, *Dallas, C. J., dubitante*, that the plaintiffs were entitled to recover the £3068, being the gross freight, without any deduction. "In questions on policies of insurance," said *Burrough, J.*, "the course has always been to ascertain the custom of merchants. There is a strong instance of this in 1 Burr. 341 (*Pelly v. Royal Exchange*), where it being found to be an universal and well-known usage for China ships to unrig and place their tackle in a warehouse on Bank Saul, in Canton river, the insurers on a ship were held liable for a loss happening to her tackle by fire on this Bank Saul. Now the usage in the present instance is as well known to all brokers as that was relating to Bank Saul, and in these cases the usage of trade has always been the ground of decision."

In the case of an *open* policy on freight, if only part of the cargo be on board or contracted for at the time of the loss, and there be a total loss of this part, the underwriters will be liable only for the actual amount of the freight of the part of the cargo so lost, together with premiums of insurance, and commission thereupon. See *Forbes v. Aspinall, ante*, p. 188; *Forbes v. Cowie*, 1 Campb. N. P. 520.

It may here be mentioned that valuation in a policy is only conclusive in settling a loss upon it between the assured and underwriters who have subscribed it,

without taking into consideration what has been transacted between the assured and third persons. Thus, in *Bousfield v. Barnes*, 4 Campb. 228, where an action was brought on a policy of insurance on the ship 'Ocean,' valued at £8000, only £600 had been subscribed upon this policy. By another policy with the London Assurance the ship was insured for £8000, being valued at £8000. Upon the wreck of the ship the London Assurance paid to the plaintiff the £6000 which they had subscribed. Evidence was now adduced that the ship was worth above £8000. It was contended on the part of the defendant that, as the plaintiff had already received the full amount of the sum at which the ship was valued by the policy on which the action was brought, the plaintiff could not maintain the action, as he was already fully indemnified. Lord *Ellenborough* however held that the plaintiff was entitled to recover. "I think," said his Lordship, "it is not enough for the underwriters on a particular policy to show that the assured has received from another quarter the amount of the valuation in that policy, unless this amounts *in point of fact to a complete indemnity*. In the present case the ship insured is proved to have been worth above £8000. The plaintiff has received only £6000 from the London Assurance. He has therefore an interest of £2000 to which he may apply the policy on which the action is brought. The policy is only

subscribed for £600. Therefore, when the whole of that sum has been paid, he will still be a loser to the amount of £1400 by the total loss of the vessel."

Where however a person effects two insurances, declaring the *same value* in each, he is bound by that sum, and cannot recover beyond that extent. Thus, in *Irving v. Richardson*, 1 Mood. & Rob. 153, a party insured by one policy for £1700 on a ship valued at £3000, and by another on the same ship,

valued again at £3000. It was held by Lord *Tenterden*, C. J., that the assured could not receive more than £3000 on the two policies. See also S. C. 2 B. & Ad. 193; *Morgan v. Price*, 4 Exch. 615.

Where the assured has an interest in any part of a cargo, on a valued policy it will be unnecessary for him to prove the amount of interest, as its value will be taken to be that of the value insured. *Feise v. Aguilar*, 3 Taunt. 506.

TYRIE v. FLETCHER.

Mich. Term, 18 Geo. III., B.R., Tuesday, Nov. 26th, 1777.

[REPORTED COWP. 666.]

INSURANCE—RETURN OF PREMIUM.]—*Upon a policy “at and from such a port to any other port or place whatsoever, for twelve months at £9 per cent., warranted free from capture,” the risk is entire; and therefore if once begun there shall be no return of the premium.*

This was an action on the case, for money had and received to the plaintiff's use, brought by the plaintiff, the *insured* in a policy of insurance, against the defendant, the underwriter, for a return of part of the premium.

The cause was tried before Lord *Mansfield*, at Guildhall, at the Sittings after last Trinity Term, when, by consent, a verdict was found for the plaintiff, subject to the opinion of the Court upon the question, whether, under the circumstances of the case, a proportionable part of the premium ought to be returned or not? If the Court should be of opinion that a proportionable part of the premium ought not to be returned, then a nonsuit was to be entered.

It now came before the Court upon a rule to show cause why a nonsuit should not be entered; and the cause, as it appeared from the report, was shortly this:—“The policy of insurance was upon the ship ‘*Isabella*,’ at and from London to any port or place, where or whatsoever, for twelve months, from the 19th of August, 1776, to the 19th of August, 1777, both days inclusive, at £9 per cent. warranted free from captures and seizures by the Americans and the consequences thereof.” In all other respects it was in the common form, against all perils of the sea, etc.

The ship sailed from the port of London, and was taken by an American privateer, about two months afterwards.

Mr. *Dunning* and Mr. *Davenport*, for the plaintiff, showed cause,

and insisted that a proportionable part of the premium in this case ought to be returned ; that £9, the compensation estimated for the risk of twelve months, was much more than adequate to the risk actually run in this case, viz. only two months ; that from the nature of the insurance, both parties must know the risk was divisible, and of course intended, if it ceased before the twelve months, that the whole premium should not be retained ; that this was the law in other cases, where upon a suitable compensation for a given risk, the risk had turned out to be different from what was expected. In *Stevenson v. Snow* (3 Burr. 1237), the risk ceased before the end of the voyage insured, and it was there held there should be a return of the premium in proportion to the risk that had not been run. It is true that was a policy upon a voyage ; but it is as easy, or easier, to apportion the risk in a policy upon time as it is in a policy upon distance. In the case of *Bond v. Nutt*, Trin. 17 Geo. III., B. R. (Cowp. 601), which was a policy "at and from Jamaica to London," the underwriters paid into Court a part of the premium, in proportion to that part of the voyage from which they held themselves discharged. This case is not like the case of an insurance upon lives, to which it was compared at the trial ; because that is in the nature of a wager. But this is, in the true spirit and use of an insurance, an indemnity against a loss. That loss, according to the terms of the policy, might accrue later or earlier, or not at all ; but in the case that has happened, namely, a capture by an American privateer, the risk of any such loss as that insured against must totally cease. The construction therefore of this policy, under these circumstances, ought to be, that it was an insurance for twelve months, at the rate of so much per month ; and as the risk in fact was only run for two months, the premium advanced upon the other ten ought to be returned.

Mr. *Wallace* and Mr. *Baldwin*, *contra*, for the defendant, and in support of the rule, contended that as soon as the ship sailed from the port of London, the policy attached for the whole time insured against. That there was no calculation of the premium, at so much per month ; but it was one entire gross sum of £9. per cent. stipulated and paid for twelve months. The contract therefore was *entire*, without any intention or thought of division or apportionment. That the case of *Stevenson v. Snow* did not at all apply ; for there the Court went upon the ground of its being a policy upon two *distinct* voyages, separately and distinctly in the contemplation of the parties at the time ; and the premium calculated accordingly.

Of course, if either of the voyages were prevented from taking place, the risk upon it could not attach; and therefore the premium ought to be returned. Upon the principles laid down on the other side, every policy for time might be divided. Suppose an insurance for a month, would the plaintiff have been entitled to restitution for a number of days? It is absurd; and there would be no drawing the line. If there had been a recapture the policy would have been revived. The fault of the party, is not the true ground upon which the return of premium is or is not allowed; but it rests upon this: whether the risk or the voyage insured has begun? If it has, there can be no return of premium. 2 Magens, No. 1071. There are many cases where, notwithstanding the fault of the party, a return of premium is allowed. For instance, if a ship is insured at and from such a port to such a port, and the party goes on another voyage, the premium must be returned, because the risk never commenced. So, if he is to sail with convoy, and stays behind. But with respect to the present case, it is not distinguishable from an insurance upon a life for a year, with an exception of suicide, where the party destroys himself within a month. No one ever thought of requiring a return of premium in that case, because the risk is entire. So here, it is one *entire, indivisible* risk; which being once begun, there can be no return of premium, and consequently the plaintiff is not entitled to recover.

Lord Mansfield, C.J.—It was very proper to save this case for the opinion of the Court, because in all mercantile transactions, certainty is of much more consequence than which way the point is decided, and more especially so in the case of policies of insurance; because if the parties do not choose to contract according to the established rule, they are at liberty between themselves to vary it.

This case is stripped of every authority. There is no case or practice in point; and therefore we must argue from the general principles applicable to all policies of insurance. And I take it, there are two general rules established, applicable to this question,—the first is, *That where the risk has not been run, whether its not having been run was owing to the fault, pleasure, or will of the insured or to any other cause, the premium shall be returned*, because a policy of insurance is a contract of indemnity. The underwriter receives a premium for running the risk of indemnifying the insured, and whatever cause it be owing to, if he does not run the risk, the consideration, for which the premium or money was put into his hands, fails, and therefore he ought to return it. 2. Another

rule is, that *if that risk of the contract of indemnity has once commenced, there shall be no apportionment or return of premium afterwards.* For though the premium is estimated, and the risk depends upon the nature and the length of the voyage, yet, if it has commenced, though it be only for twenty-four hours or less, the risk is run; the contract is for the whole entire risk. And no part of the consideration shall be returned; and yet it is as easy to apportion for the length of the voyage, as it is for the time. If a ship had been insured to the East Indies agreeably to the terms of the policy in this case, and had been taken twenty-four hours after the risk was begun by an American captor, there is not a colour to say that there should have been a return of the premium. So much then is clear; and indeed perfectly agreeable to the ground of determination in the case of *Stevenson v. Snow* (3 Burr. 1237), for in that case, the intention of the parties, the nature of the contract, and the consequences of it, spoke manifestly *two* insurances and a division between them. The first object of the insurance was from London to Halifax, but if the ship did not depart from Portsmouth with convoy (particularly naming the ship appointed to be convoy), then there was to be no contract from Portsmouth to Halifax. Why then, the parties have said, "we make a contract from London to Halifax, but on a certain contingency it shall only be a contract from London to Portsmouth." That contingency not happening, reduced it in fact to a contract from London to Portsmouth only. The whole argument turned upon that distinction. Mr. *Yates*, who was for the plaintiff, put it strongly upon that head; and all the judges, in delivering their opinion, lay the stress upon the contract comprising two distinct conditions, and considering the voyage as being in fact two voyages; and it was the equitable way of considering it; for though it was at first consolidated by the parties, there was a defeasance afterwards, though not in words. I think Mr. Justice *Wilmot* put it particularly upon that ground, but it was the opinion of the whole Court. There was a usage also found by the jury in that case, that it was customary to return a proportionable part of the premium in such-like cases, but they could not say what part. The Court rejected this as a usage for the uncertainty; but they argue from it, that there being such a custom, plainly showed the general sense of merchants as to the propriety of returning a part of the premium in such cases. And there can be no doubt of the reasonableness of the thing.

There has been an instance put of a policy where the measure is by time, which seems to me to be very strong, and apposite to the present case; and that is an insurance for a man's life for twelve months. There can be no doubt but the risk there is constituted by the measure of time, and depends entirely upon it; for the underwriter would demand double the premium for two years, that he would take to insure the same life for one year only. In such policies there is a general exception against suicide. If the person puts an end to his own life the next day, or a month after, or at any other period within the twelve months, there never was an idea in any man's breast that part of the premium should be returned.

A case of general practice was put by Mr. Dunning, where the words of the policy are, "At and from, provided the ship shall sail on or before the 1st of August," and Mr. Wallace considers in that case, that the whole policy would depend upon the ship sailing before the stated day. I do not think so; on the contrary, I think with Mr. Dunning, that cannot be. A loss in port *before* the day appointed for the ship's departure, can never be coupled with a contingency after the day; but if a question were to arise about it, as at present advised, I should incline to be of opinion, that it would fall within the reasoning of the determination in *Stevenson v. Snow*, and that there were two parts or contracts of insurance, with distinct conditions. The first is,—I insure the ship in port, provided she is lost in port before the 1st of August; and secondly, if she is not lost in port, I insure her then during her voyage from the 1st of August till she reaches the port specified in the policy. The loss in port must happen before the risk upon the voyage could commence; and, *vice versa*, the risk in port must cease the moment the risk upon the voyage began.

Let us see then what the agreement of the parties is in the present case. They might have insured from two months to two months; or in any less or greater proportion, if they had thought proper so to do; but the fact is, that they have made *no division of time at all*; but the contract entered into is one entire contract from the 19th August, 1776, to the 19th August, 1777, which is the same as if it had been expressly said by the insured, "If you, the underwriter, will insure me for twelve months, I will give you an *entire* sum; but I will not have any apportionment." The ship sails and the underwriter runs the risk for two months, no part of the premium then shall be returned. I cannot say, if there had been a recapture before the expiration of the twelve months, that the policy would not have revived.

Aston, J.—This case depends upon the words of the policy, and I am of opinion it is one entire contract at a certain gross sum of £9 per cent. for a certain period of time, viz. twelve months; and that no division is to be implied. The determination in *Stevenson v. Snow* went expressly upon this consideration, that there were two distinct voyages; and no consideration received by the insured for the premium upon the second voyage; and there certainly was not, for there never was any point of time when any risk was run from Portsmouth. In *Bond v. Nutt*, the losses insured against were distinct, and unconnected with each other: 1st, a loss of the ship in port, if any should happen there; 2ndly, a loss in her passage home, provided she sailed on a certain day. The risk in some policies may be distinct and divisible in its nature. In the case of an insurance upon a life, the sum is lumped, and the time is lumped for the year. So in this case, I think the contract is one entire contract; and therefore, that there ought to be no return of premium.

Mr. Justice *Willes* and Mr. Justice *Ashurst* were of the same opinion.

Per Cur. Let a nonsuit be entered.

When an underwriter is able to show that he is not liable upon a policy of insurance, the question often arises, whether the insured is entitled to a return of the whole or a part of the premium.

Cases where Risk has not been run.—In the absence of any express stipulations (which are often inserted in policies) the rules laid down by Lord *Mansfield*, C. J., in the principal case are always referred to for the purpose of determining the question.

"The first rule," in the words of that eminent judge, "is that *where the risk has not been run*, whether

its not having been run was owing to the fault, pleasure, or will of the insured, or to any other cause, the premium shall be returned." The reason he gives is, "Because a policy of insurance is a contract of indemnity. The underwriter receives a premium for running the risk of indemnifying the insured, and whatever cause it be owing to, if he does not run the risk, the consideration, for which the premium or money was put into his hands, fails, and therefore he ought to return it."

To show the application of this rule, may be cited the case of *Martin v. Sitwell*, 1 Show. 151. There

a policy had been effected on goods and a premium paid on behalf of the plaintiff, who had *no goods on board*: it was held that the premium must be returned. "The money," said *Holt*, C. J., "is not only to be returned by custom, but the policy is made originally void, the party for whose use it was made having no goods on board; so that by this discovery the money was received without any reason, occasion, or consideration, and consequently it was originally received to the plaintiff's use."

So if the insured has no insurable interest in a *ship*, if there be no illegality in the voyage nor fraud in effecting the policy, he will be entitled to claim a return of the premium from the underwriters, who set up his want of an insurable interest as a defence to his claim upon the loss of the ship. See *Routh v. Thompson*, 11 East, 428.

Where however the risk has been run, and the ship or goods insured have arrived in safety, the premium cannot be recovered upon the ground of the plaintiff not having had an insurable interest. *McCulloch v. Royal Exchange Assurance Company*, 3 Campb. 406.

When either, in a valued or an open policy, only a part of the goods insured are put on board, a proportionable return of the premium must be made for what is termed "short interest." For example, if 100 bales of cotton be insured, valued at £1000, or at £10 per bale, or if 100 bales of cotton be specified in the policy as the

subject of insurance without any valuation, in such and the like cases, if there be only 50 bales on board, "or only half the interest intended, and declared to be insured, a return of half the premium must be made for short interest." 2 Arn. Mar. Ins. 1224, 2nd ed.; Stevens on Average, 204, 5th ed.; see also *Horney v. Lushington*, 15 East, 46; 3 Campb. 90.

So likewise when the *profits* on goods are insured, a return of premium will be made for short interest, which means no more than a short profit on the cargo to the extent of the whole sum insured. *Eyre v. Glover*, 16 East, 218, 220.

In the case however of a valued policy, if *all the goods have been put* on board, there will be no return of premium made, upon the ground that the goods were not of the value mentioned in the policy. *MacNair v. Coulter*, 4 Bro. P. C. 450, Toml. ed.; and see Stevens on Average, 200, 5th ed.

If an over-insurance has been effected, that is to say, where the assured insures property for a greater amount than its actual value, as he could only recover from the underwriters the amount of the value, and as that is the measure of their risk, he will be entitled to recover from them a part of the premium, proportioned to the amount by which the aggregate sum insured exceeds the insurable value of the property risked. The question then arises, how in the event of there being *several* underwriters, shall they contribute to return the premium? It seems to

be clear that where the over-insurance is effected by a *single policy*, all the underwriters, whatever may be the date of their subscriptions, must contribute rateably to the return. Marsh. on Insurance, 649.

The law is also the same where there are several policies of the *same date*, as these are considered as one policy. *Fisk v. Masterman*, 8 Mees. & W. 165.

Where however there are several sets of policies of *different dates*, those underwriters who have at any time been liable to pay the whole amount of their subscriptions are entitled to retain the whole amount of the premium, while the underwriters on the subsequent sets who do not come within that category must make a rateable return for over-insurance. Thus, in *Fisk v. Masterman*, 8 Mees. & W. 165, the plaintiff, a merchant at New Orleans, shipped 1957 bales of cotton from Mobile to Liverpool, consigned to a house there. On the 12th April, insurances were effected on the cotton by five several policies, at the rate of fifty guineas per cent. On the 13th, news of the vessel's safety having arrived, a further insurance was *bond fide* effected by six different policies, at ten and five guineas per cent. The latter insurance, added to the former, exceeded in amount the value of the subject-matter insured, but the former of itself did not. It was held by the Court of Exchequer that the plaintiff was entitled to have a return of the premiums to the amount of the over-insurance, to which the

underwriters who subscribed the policies on the 13th of April were to contribute rateably, in proportion to the sums insured by them respectively on that day,—the amount of the over-insurance to be ascertained by taking into account all the policies, but no return of premium was to be made in respect of the policies effected on the 12th of April.

The principle upon which this case proceeds is this: that the return of premium must be proportionable to the risk run. Suppose, for instance, the ship had been lost, and news of her loss had arrived on the afternoon of the 12th, and before the policies of the 13th were effected, the defendants would have been bound to pay the whole amount insured by them, and having once run the risk, they were entitled to keep the premium as compensation for their risk.

Again, where the policy is rendered void *ab initio* in consequence of the assured not complying with some express or implied warranty, as no risk will be run by the insurers, the assured may recover back the premium. Thus, if the assured commits a breach of the express warranty of neutrality (*Henckle v. Royal Exchange Assurance Company*, 1 Ves. 319), or of sailing with convoy (*Long v. Allen*, Marsh. on Ins. 668), or of the implied warranty of seaworthiness (*Penson v. Lee*, 2 Bos. & P. 330; *Annen v. Woodman*, 3 Taunt. 299), the premium may be recovered by the assured.

Upon the same principle as will

be hereafter more fully shown where the risk has never commenced there will be a return of the premium. The case of *Stevenson v. Snow* (3 Burr. 1237), commented upon by Lord *Mansfield*, C.J., in the principal case, is a good illustration of this proposition.

Cases where Risk has commenced.

—Another rule laid down and acted upon in the principal case is, “that if the risk of the contract of indemnity has *once* commenced, there shall be no apportionment or return of premium afterwards. For though the premium is estimated, and the risk depends upon the nature and the length of the voyage, yet, if it has commenced, though it be only for twenty-four hours or less, the risk is run; the contract is for the whole entire risk, and no part of the consideration shall be returned.” Upon the same principle as that acted upon in the principal case, where a ship had been insured for twelve months “at 15s. per cent. per month £18,” and was lost within the first two months, it was held that there should be no apportionment or return of the premium. Lord *Mansfield*, C.J., observing that “when the risk has begun, there never shall be a return, although the ship should be taken in twenty-four hours.” *Loraine v. Thomlinson*, 2 Doug. 585.

If a ship insured from A. to B. sail in an unseaworthy condition, as the underwriter’s risk never commences (for he is discharged from it by the breach of the im-

plied warranty of seaworthiness), the premium, as we have already observed, must be returned (*Penson v. Lee*, 2 Bos. & P. 330), but if a vessel be insured “at and from” a port, and she is seaworthy for service in the port, but unseaworthy for the voyage, then as the underwriters would have been liable for a loss in port, as the risk once attached, there would be no return of the premium. *Annen v. Woodman*, 3 Taunt. 299; *Meyer v. Gregson*, Park, 796.

Upon the same principle, although when a ship has deviated from her course the underwriter is discharged, yet inasmuch as *the risk has once attached*, the *assured* will not be entitled to a return of the premium. *Moses v. Pratt*, 4 Campb. 297; *Tait v. Levi*, 14 East, 481.

Where however the insurance comprises in effect two or more distinct voyages, then there will be an apportionment and return of the premium in respect of those voyages which have *not commenced*, because with respect to them no risk has been run. This was decided in the case of *Stevenson v. Snow* (3 Burr. 1237; 1 W. Black. 318), commented upon by Lord *Mansfield*, C.J., in the principal case, and which it will be observed in a great measure turned upon the usage of the underwriters to make a return in such a case. Upon the same principle in *Long v. Allen*, Park on Insurance, 797, 8th ed., 4 Dougl. 278, policy was “at and from Jamaica to London, warranted to depart with convoy for

the voyage, and to sail on or before the 1st of August, upon goods on board a ship called the 'Jamaica,' at a premium of twelve guineas per cent." The ship sailed from Jamaica to London on the 31st of July, 1782, but without any convoy for the voyage. At the trial before Lord *Mansfield*, the jury found a verdict for the plaintiff, subject to the opinion of the Court, stating the facts already mentioned. In addition to which they *expressly* find, that it is the constant and invariable usage in any insurance, at and from Jamaica to London, warranted to depart with convoy, or to sail on or before the 1st of August, when the ship does not depart with convoy, or sails after the 1st of August, to return the premium, deducting one-half per cent. Lord *Mansfield*, C. J., said, "An insurance being on goods warranted to depart with convoy, the ship sails without convoy, and an action is brought to recover the premium. The law is clear, that if the risk be commenced, there shall be no return. Hence questions arise of distinct risks insured by one policy or instrument. My opinion has been to divide the risks. I am aware that there are great difficulties in the way of apportionments, and therefore the Court has sometimes leaned against them. But where an *express usage* is found by the jury, the difficulty is cured. They offered to prove the same usage as to the West Indies in general, but I stopped them and confined the evidence to Jamaica." See also *Gale v. Ma-*

chell, Marsh. on Insurance, 667; Park on Insurance, 797, 8th ed.

But should there be no usage of trade proved, to consider such risks as divisible, or to make a rateable return of premium for the risk on part only of the voyage, the risk will be considered as entire, and if once begun then no part of the premium will be returned. *Meyer v. Gregson*, 3 Dougl. 402; Park on Insurance, 796, 8th ed.; Marsh. on Insurance, 666.

Effect of Illegality or Fraud where a Return of Premium is claimed.—Where a policy is void on the ground of illegality, as for instance, that it is a wager-policy (*Lowry v. Bourdieu*, Dougl. 468; *Aubert v. Walek*, 3 Taunt. 277), or that it effects a re-insurance void under 19 Geo. II. c. 37, s. 4 (*Andree v. Fletcher*, 3 T. R. 266), or covers a voyage to carry on trade with the enemy's country (*Vandysk v. Hewitt*, 1 East, 96), at any rate where the risk has been run, and the event taken place, the assured cannot claim a return of the premium. The principle upon which the law on this subject proceeds, depends upon the well-known maxim *in pari delicto potior est conditio possidentis*. See *Lowry v. Bourdieu*, 2 Dougl. 468. Ignorance of the law is no excuse even in the case of a foreigner (*Morek v. Abel*, 3 Bos. & Pull. 35), where however the policy is effected in ignorance of facts, as that war has been declared between our own country and the country the trading to which is covered by the policy (*Oom v. Bruca*,

12 East, 225), or where the party assured contemplated a legal and not an illegal voyage by obtaining a license from the proper authorities before the sailing of the vessel, and the vessel departed without a license contrary to the opinion and expectation that he might reasonably entertain (*Henry v. Staniforth*, 4 Campb. 270; S. C. 5 Maule & Selw. 122), in these and like cases the assured may recover back the premium. See also *Stiffen v. Allnutt*, 1 Maule & Selw. 39; but if the assured knew that the vessel sailed without a license, although he may afterwards procure one, he will not be able to recover back the premiums. *Cowie v. Barber*, 4 Maule & Selw. 16.

The distinction was taken by Mr. Justice Buller, in *Lowry v. Bourdieu*, 2 Dougl. 468, that although a policy be effected for an illegal voyage, nevertheless if the assured brings his action to recover the premium *before the risk is over and the voyage finished*, he might have a ground for his demand. This view was adopted in other cases. See *Aubert v. Walsh*, 3 Taunt. 276; *Lacauseade v. White*, 7 T. R. 535; *Hewson v. Hancock*, 8 T. R. 575; 8 & 9 Vict. c. 109, s. 18; *Toppenden v. Randall*, 2 Bos. & Pull. 467.

But where the insurance is void for illegality, even though the risk was never commenced under the policy, the assured cannot recover back the premium without some formal renunciation of the contract made known to the underwriter before the bringing of

the action. Thus, in *Palyart v. Leckie*, 6 Maule & Selw. 290, a policy was effected on goods on board the 'Audaz' (a Spanish ship) or any other ships "at and from" New Orleans and Pensacola, to a port or ports in the United Kingdom. Pensacola, at the time of effecting the policy, belonged to Spain, and New Orleans to America; which latter country was at war with Great Britain, Spain being neutral, and the assured intended by the policy to cover an importation of cotton-wool from New Orleans to Liverpool. It was held by the Court of King's Bench that the assured, not having given notice of his intention to rescind the contract, could not recover back the premium. "I confess," said Lord Ellenborough, C. J., "that I wish we had never departed from the plain and intelligible rule, that where the contract is founded upon a consideration clearly illegal, neither party should be allowed a *locus standi*, and to receive any assistance in a court of justice. This is a broad principle which no one could well misapprehend, and we have got into some difficulty by receding from it. However in the present case, giving the utmost latitude to this doctrine, that there ought to be a *locus penitentiae*, and that the party ought not to be compelled against his will to adhere to the contract, I see nothing to lead me to the conclusion that this party withdrew from the contract; he manifested no such intention before the bringing of the action.

It cannot be denied that he stood at least *in pari delicto*, perhaps in a higher degree than the defendant. Under these circumstances, I am unable to understand the ground on which this action is to be maintained. I would add, with reference to the party's withdrawing himself from the contract, that there ought, as it seems to me, to be some notice given of his intention. How is the underwriter to know that the risk is abandoned? The adventure is not confined to any particular ship; it may be in this or any other ship or ships. There was no indication in this case of the plaintiff's abandonment, except by bringing the action, which is but a notice by inference."

If the policy be rendered void by the fraud of the underwriter, as if when at the time he subscribes the policy he knows that the ship has arrived safe (*Carter v. Boehm*, 3 Burr. 1909), or he makes positive misrepresentations in a point of materiality (*Duffell v. Wilson*, 1 Campb. 401), the assured may recover back the premium.

Where however there has been actual and gross fraud on the part of the assured or his agent, as, for instance, if they insure a ship which they know has been lost, it has finally been decided, overruling the older authorities (*Whittingham v. Thornburgh*, 2 Vern. 206; *Da Costa v. Scandret*, 2 P. Wms. 170; *Wilson v. Duckett*, 3 Burr. 1361), that the premium shall not be returned. *Tyler v. Horne*, Marsh. on Insurance, 661; *Chapman v. Fraser*, ib. But it seems that where there has been mere misrepresen-

tation on the part of the assured without fraud, provided the risk never attached, the premium will be returned. *Feise v. Parkinson*, 4 Taunt. 640; *Anderson v. Thornton*, 8 Exch. 425.

Where the assured by his own act renders void the policy, as by adding in writing, after a subscription by the underwriter, a further subject-matter of insurance (*Langhorn v. Cologan*, 4 Taunt. 330), or by tearing off the seal of the policy (*Id.* 333) without the consent of the underwriter, the underwriter having fulfilled all his part, the assured can no more compel the underwriter to return the premium, than the underwriter can compel him to relinquish the contract.

Stipulations for Return of Premium, etc.—As to the return of the premium under express stipulation, see *Simond v. Boydell*, Dougl. 268; *Aguilar v. Rodgers*, 7 T. Rep. 421; *Horncastle v. Ha-worth*, Marsh. on Insurance, 681; *Kellner v. Le Mesurier*, 4 East, 396; *Leevin v. Cormac*, 4 Taunt. 483, note; *Dalgleish v. Brooke*, 15 East, 295; *Langhorn v. Allnutt*, 4 Taunt. 511; *Audley v. Duff*, 2 Bos. & Pull. 111; *Hunter v. Wright*, 10 Barn. & C. 714.

Unless a stipulation is made to the contrary, where the premium is returned either wholly or in part, the underwriter will be allowed a deduction of one-half per cent. *Stevens on Average*, 206, 5th ed.

As to the practice of paying the premium into court, see *Penson v. Lee*, 2 Bos. & P. 330.

DON v. LIPPMANN.

SIR WILLIAM HENRY DON, of Newton, Baronet . *Appellant*.
 M. LIPPMANN, residing at Nancy, in France *Respondent*.

House of Lords, April 21, 28; May 3, 26, 1837.

[REPORTED 5 C. & F. 1.]

FOREIGN CONTRACTS.]—*The law of a country, where a contract is to be enforced, must govern the enforcement of such contract. Where, therefore, bills were drawn and accepted, and became due in France, but the acceptor, a Scotchman, before such bills became due, returned to Scotland, and there continued till his death.*

HELD, by the Lords (reversing the decision of the Court of Session), *that more than six years having elapsed between the time of the bills becoming due and the action being brought, the Scotch law of prescription applied, and that its effect was not prevented by the fact that the payee had taken legal proceedings in France during the absence of the debtor, and had obtained judgment against him. A Court which is called on to enforce a foreign judgment, may examine into that judgment to see whether it has been rightfully obtained or not.*

The late Sir Alexander Don, the father of the appellant, happened to be within the French territory in 1802, when hostilities recommenced between this country and France, after the peace of Amiens, and with many other British subjects was tyrannically detained in France. He remained a prisoner until February, 1810.

Upon the 13th of November, 1809, Charles Fagan, merchant in Paris, drew two bills upon him, which are dated "Versailles," ordering him, as acceptor, to pay the respondent Lippmann, who was named in the bills as payee, the sum of 20,000 francs, each bill being for that amount. These bills were drawn upon the acceptor at the "Hôtel de Richelieu, Paris,"—his place of residence; were

made payable on the 1st of March; and were drawn and accepted in the following terms:—

“*Versailles, le 13 9bre, 1809.*

“Bon pour 20,000 fr.

“Au premier Mars prochain, payez par cette première de change, à l'ordre de M. Lippmann, la somme de vingt mille francs, valeur reçu, sans autre avis.

“A Monsieur, Monsr. Don.

“Bon pour vingt mille francs.

“(Signed) CHAS. FAGAN.

“*Hôtel Richelieu, Rue Neuve-St.-Augustin, Paris.*

“Accepté pour la somme de vingt mille francs, payable le premier Mars, 1810.

“(Signed) ALEXANDER DON.”

Before the bills became due, Sir Alexander Don left Paris, and was in England in the month of February, 1810. When the bills became due they were dishonoured, and protested for non-payment against the acceptor, and the dishonour was intimated to Charles Fagan, the drawer.

M. Lippmann then commenced proceedings according to the law of France, against both the acceptor and drawer of the bills, and, in the action raised before the Tribunal de Commerce of the department of the Seine, Charles Fagan, the drawer, made appearance, but he did not deny the validity of the debt. He requested the Court, however, to give him time, in order that he might arrange as to payment of the bills. On the 25th July, 1810, judgment was pronounced against both the drawer, who had made appearance, and against Sir Alexander Don, the acceptor, in absence. All the requisites of the law of France were stated to have been complied with in these proceedings. The decree of the Court was for payment of the contents of the bills, and fifty-nine francs of expenses, exclusive of the expense of registering the judgment. This judgment was, in the pleadings in the present suit, alleged to have been intimated on the 22nd October, 1810, by the proper officer, and according to legal form, at the former residence of Sir Alexander Don; and it was stated that he had left the Hôtel Richelieu about six months before, and was believed by the servants at the hotel to have gone to England; execution then followed against the effects of Charles Fagan, as his person could not be found. That person afterwards died, and about the month of March, 1813, his effects were sold at the instance of M. Lippmann, and the sale was reported

by the auctioneer as having produced 434 francs, after deducting expenses; for which credit is given.

A claim was made on Sir Alexander Don, but he positively declared that he had remitted to France ample funds to pay all his just debts; and after a correspondence on the subject, which took place in 1814, no further claim was made on Sir Alexander Don in his lifetime. He died in April, 1820.

The action, now the subject of appeal, was commenced on the 3rd of April, 1829, and it was founded both upon the bills and the judgment. The defendant, who, being an infant, appeared by his tutor, set up in defence the Act of 1772, by which it is declared, "That no bill of exchange, etc., shall be of force in Scotland unless diligence shall be raised and executed, or action commenced thereon within six years from and after the terms at which the sums in the said bills shall become exigible."

The question which was raised was, *whether the law of Scotland or that of France was applicable to the case*. If the former, then the Act of 1772, which limits the right of suing to within six years after the bill, etc., becomes due, had taken effect, and the action was barred by prescription; if the latter, then the bar by prescription would take effect at five years from the date of the instrument, unless proceedings were taken in a French Court on such instrument; but if such proceedings were taken, then after judgment therein obtained, the prescription would not be a bar for thirty years after the date of the judgment, and consequently the decree in the French Court might properly be made the ground of the present suit.

When the case came before the Lord Ordinary, he took the opinions of French counsel on the law of France, and after having taken time for consideration, he pronounced an interlocutor repelling the plea of sexennial prescription, and finding that the defendant was entitled to be reponed against the judgment of the Tribunal of Commerce in France. He therefore appointed the parties to be further heard on the merits of the case. In a note appended to the interlocutor, his Lordship went fully into the question of the particular law by which a claim on bills of this sort was to be decided, and intimated that he looked upon the proceedings in France as merely sufficient to repel the plea of prescription, but not as sufficient to preclude the defender from answering the claim by going into the merits of the case. The Lords of the first Division of the Court of Session sustained this interlocutor.

Sir *W. Follett* and Mr. *M. Smith*, for the appellant.—The law by which this case must be decided is that of the country where the remedy is sought to be enforced.¹ The remedy here was sought to be enforced in Scotland. The bills too became due while the acceptor was domiciled in Scotland, and therefore by the law of Scotland were payable there. The *lex loci solutionis* must therefore prevail over the *lex loci contractus*. The Scotch plea of prescription is consequently applicable to the suit, and forms a complete bar to it. If a French bill of exchange is sued on in England, it must be sued on according to the law of England, and then the English Statute of Limitations would form a bar to the demand, if the bill had been due for more than six years.² *De la Vega v. Vianna* (1 B. & Ad. 284); *The British Linen Company v. Drummond* (10 B. & C. 903). It is admitted that the law of the place where the contract is made, must be employed to expound the contract. But there is a manifest distinction between expounding and enforcing a contract. If this first proposition is established, then it follows that the prescription thus created by the law of the country where the remedy is sought to be enforced, cannot be prevented from taking effect but by something which that law itself admits to be sufficient to defeat the prescription. Now, that cannot be the case with the proceedings in the French Court. Those proceedings were altogether such as neither the Scotch nor the English law would recognize. They were taken in the absence of Sir Alexander Don; in the Courts of a country where he was at the time an alien enemy; where he would not have been permitted, by the law of that country, to appear and claim any civil rights; and where he had neither property to be attached, nor an appointed agent to be answerable for him. All the cases in which the decrees of foreign Courts have been treated as *prima facie* evidence of the existence of a debt, have been those where the parties did appear, or had full opportunity of appearing, before the tribunal pronouncing the decree, or where they had property situated or agents residing within the jurisdiction: *Goddard v. Swinton* (Morr. 4533); *Edwards v. Prescott* (ib. 4535). In the case of *Sinclair v. Fraser* (ib. 4542) the Scotch Courts did not carry out the doctrine of the above-cited cases, but on appeal to the House of Lords, they were directed to review their decision, and make it conformable to the preceding authorities. The case of *Douglas v. Forrest* (4 Bing. 686) is not

¹ Voet. De Statutis, lib. 1, tit. 4, part 2, s. 58. Huber, De Conflictu Leg. Div. Ersk. B. iii. tit. 7, s. 48.

² Chitty on Bills, 8th edit. 613.

opposed to this argument, for though the English Courts there enforced a decree of the Scotch Courts made against a party in his absence, the judgment expressly proceeded on the ground that he had real property in the country, the tribunals of which had pronounced the decision, and that as his property was under the protection of the Scotch law, it must be held liable to the decrees of that law. In effect, therefore, *Douglas v. Forrest* adopted the principle of the decision in *Buchanan v. Rucker* (1 Camp. 63; 9 East. 192). This last case distinctly settled that a decree obtained against a person who was not within a jurisdiction, and who had no property within it, could not be effectual for any purpose whatever. The Scotch Courts have always recognized the principles laid down in these English cases, and it follows, therefore, that the proceedings in France, which were had behind the back of the party, by a tribunal before which he could not appear, and in a country where he had no property, cannot be received as judicial notice of a claim so as to prevent the operation of the Statute of Limitations. The authority of Lord Kaimes is in favour of the appellant, for he says in distinct terms,¹ that it ought never to be a question, "whether a foreign prescription or that of our own country ought to be the rule, for our own prescription must be the rule in every case that falls under it, and not the prescription of any other country." The same author, noticing the statute of 1579, which introduced the triennial prescription, observes that it directs the judges "not to sustain action after three years" without making any distinction as to the debt being Scotch or foreign. Lord *Eskgrove* put the same construction on the statute of 1772 in the case of *Della Valle v. The York Buildings Company* (March 9, 1786). It is clear, therefore, on all the authorities, as well as on principle, that the prescription of a right of action on any obligation must be regulated by the *lex fori* of the remedy, and not by the *lex loci contractûs*. The decision of the Court below must consequently be reversed.

Dr. *Lushington* and Mr. *Gordon* for the respondent:—The decision of the Court below was correct in admitting the proceedings in the French Courts as a bar to the prescription. Both the drawer and acceptor of the bills were liable to the payee, and proceedings against one only would have been sufficient to affect both: *Gordon v. Bogle* (Morr. 1127). But here there were proceedings against both, and judgment was obtained against both according to the proper forms of the law of the country where those proceedings

¹ Principles of Equity, vol. ii. p. 353.

were had. But then it is said, that the *lex loci contractus* is not to decide a case of this sort, where one of the parties is subject to another jurisdiction. That argument cannot be sustained. The parties making a contract, make it with reference to the law of the country in which it is made. They cannot anticipate that it is to be broken, and that it will have to be enforced in another country. At all events, they cannot be supposed to make such an anticipation where the contract is for the simple payment of a sum of money. The French Courts had jurisdiction in this case, because the contract was entered into in France, both the parties being resident there, and both expecting the contract to be performed there; and by the law of that country, it is not absolutely necessary that, when the performance of such a contract is claimed, the foreigner who made it should actually be in France. Proceedings may, even in his absence, be taken to enforce performance of it. If therefore the French Courts had jurisdiction over the matter, then it is a well-established principle of law, that the judgments or decrees of foreign Courts having competent jurisdiction, afford at all events *prima facie* evidence of a claim, and that effect will be given to them, unless they are impugned on the ground that the judgment given was contrary to the *jus gentium*, and consequently ought not to be respected in the Courts of civilized nations. Nothing short of such an objection can be allowed to impugn the judgment. Indeed, in *Geyer v. Aguilar* (7. T. R. 681) the Court of King's Bench supported a decree of one of the French Courts condemning an American vessel, although the Judges characterized the decree itself as having proceeded on principles more worthy of an Algerine Court than that of any civilized nation, and as actually authorizing an act of piracy. In the cases of *Goddard v. Swinton* (Morr. 4533), *Edwards v. Prescott* (ib. 4535), *Johnston v. Crawford* (Morr. 4544), and *Findlater v. Drummond* (Brown's Syn. 707), the jurisdiction of foreign Courts was recognized in a matter where such Courts had jurisdiction, and their judgments were enforced. Now, it is clear that the Courts had jurisdiction, and that the *lex loci contractus* must govern the present case. In *Robinson v. Bland* (1 Sir William Black. 256, and see p. 234, arg.) Lord Mansfield said, "The general rule established *ex comitate et jure gentium*, is, that the law of the place where the contract is made, and not where an action may be brought, is to be considered in expounding the contract." With regard to a bill of exchange, the Scotch law holds that the place where the bill is made payable decides by what law the contract is to be governed.

Rogers v. Cathcart (Morr. 4507); *Grove v. Gordon* (ib. 4511); *Lord Lovat v. Lord Forbes* (ib. 4513); *Parry v. M'Lachlan* (24th May, 1827); *Glyn v. Johnston* (8th June, 1830); *Phillips v. Stainfield* (Morr. 4503). The bills here were payable in France; they were drawn by a person residing in France upon another also residing there, and were accepted by him with his address in Paris affixed to the acceptance. Everything therefore showed the intention of the parties to treat these bills as French contracts. The limitation is of the very nature of the contract. The French law is consequently applicable to them. If so, then the proceedings in the French Courts are a complete bar to the prescription. But it is said that they cannot be so, because they were taken in the absence of Sir Alexander Don. But *Douglas v. Forrest* (4 Bing. 686) recognized the principle, that a judgment had in the absence of a party was not on that account alone to be treated as invalid. There is here no other objection to the judgment, which was obtained in a regular suit against Sir A. Don and his co-surety, and the latter must for such a purpose be considered as the agent of the former. The judgment in the French Court must therefore be treated as a judicial recognition of the claim, sufficient to bar the prescription now set up from taking effect.

Lord Brougham : My Lords, there is a case of *Don v. Lippmann* which was recently argued before your Lordships, and which, involving as it does a matter of national law, is one of considerable importance.

The facts of the case are these:—The late Sir Alexander Don was the acceptor of two bills of exchange, drawn on him by one Fagan, for the sum of 20,000 francs each, and payable on the 1st of March, 1810, to Fagan's order. He accepted these bills in France, but soon afterwards returned to Scotland, and died there, leaving the present appellant an infant, who now appears with the concurrence of a tutor. This action was commenced in Scotland, in April, 1829, by the payee of the bill against the appellant, as the representative of his father; the payee having previously, namely, in 1810, proceeded in the French Courts against Fagan the drawer and Sir Alexander Don the acceptor, and obtained judgment there. In that proceeding Sir A. Don was not cited, except according to a form known in the French Courts of judicature, by the affixing of notice in a public office. The payee then commenced this action, both on the bills and on the judgment obtained in that proceeding in the French Courts. The appellant defeated himself by setting

up prescription under the Scotch Act of 1772. The *Lord Ordinary*, before whom the case came, after taking the opinions of French counsel for the purpose of informing the Court as to what was the French law, pronounced an interlocutor, repelling the defence of the Scotch limitation of six years, holding that the French judgment did operate as an interruption of the prescription, and was valid as an answer to that defence in this case, and as he held the French law to be valid for the purpose of interrupting the prescription, he allowed the judgment of the French Court to enter into his consideration of the case, but did not hold it to be conclusive. He therefore reponed the defendant below, and allowed him to make out a defence in what manner he could on the merits. On this decision the case was brought before the Lords of the first division of the Court of Session, and they affirmed the judgment of the *Lord Ordinary*. This appeal was then brought before your Lordships.

It appears that in Scotland,—and it is rather singular that it should be so,—where a bill is accepted payable generally, without any particular place being named, it shall be deemed payable at the place at which the acceptor is domiciled when it becomes due. It becomes of some importance to know where the bills were payable, because this principle, which has been adopted of late years in many of the Scotch decisions, and towards which I admit the great leaning of the Scotch profession is, renders it material to consider whether this is a Scotch or a foreign debt. Yet sometimes this expression is used in the cases without affording any accuracy of description, for sometimes the debt is called English or French in respect of the place where the contract was made; sometimes it is the place of the origin; sometimes of the payment of the contract; and sometimes of the domicile of one of the parties. But at all events it becomes important to consider whether this was a foreign or a Scotch debt. In the present case it was held most properly to be a foreign debt. That is a fact admitted; it is out of all controversy. This therefore must now be taken to be a French debt, and then the general law is, that where the acceptance is general, naming no place of payment, the place of payment shall be taken to be the place of the contracting of the debt. I shall therefore deal with this bill as if it was accepted payable in Paris.

On these short and admitted facts, and on this further assumption, that the bill being accepted in France is payable there, the question arises, and it is one which is not only the principal point,

but it disposes of all the rest, namely, which of the two laws, the law of France, where the bill is accepted and is payable, or that of Scotland, where the debtor resides, shall rule the decision of the case. That is, in other words, whether the prescription set up is to be that of Scotland or France. The law on this point is well settled in this country, where this distinction is properly taken, that whatever relates to the remedy to be enforced, must be determined by the *lex fori*, the law of the country to the tribunals of which the appeal is made. This rule is clearly laid down in *The British Linen Company v. Drummond* (10 B. & C. 903), *De la Vega v. Vianna* (1 B. & Ad. 284), and in *Huber v. Steiner* (2 Scott, 304; 1 Hodges, 206; 2 Bing. N. C. 202; 2 Dowl. Pract. Cases, 781, and 4 Moore & Scott, 328), though the reverse had previously been recognized in *Williams v. Jones* (13 East, 439). Then assuming that to be the settled rule, the only question in this case would be, whether the law now to be enforced is the law which relates to the contract itself, or to the remedy. When both the parties reside in the country where the act is done, they look of course to the law of the country in which they reside. The contract being silent as to the law by which it is to be governed, nothing is more likely than that the *lex loci contractus* should be considered at the time the rule, for the parties would not suppose that the contract might afterwards come before the tribunals of a foreign country. But it is otherwise when the remedy actually comes to be enforced. The parties do not necessarily look to the remedy when they make the contract. They bind themselves to do what the law they live under requires; but as they bind themselves generally, it may be taken as if they had contemplated the possibility of enforcing it in another country. That is the lowest ground on which to place the case. The inconvenience of pursuing a different course is manifest. Not only the principles of the law, but the known course of the Courts renders it necessary that the rules of precedent should be adopted, and that the parties should take the law as they find it, when they come to enforce their contract. It is true that there may be no difficulty in knowing the law of the place of contract, while there may be a great difficulty in knowing that of the place of the remedy. But that is no answer to the rule. The distinction which exists as to the principle of applying the remedy, exists with even greater force as to the practice of the Courts where the remedy is to be enforced. No one can say, that, because the contract has been made abroad, the form of action

known in the foreign Court must be pursued in the Courts where the contract is to be enforced, or the other preliminary proceedings of those Courts must be adopted, or that the rules of pleading, or the curial practice of the foreign country must necessarily be followed. No one will assert that before the Jury Court in Scotland the English creditor of a domiciled Scotchman would have the right to call for a trial of the case by a jury ; or take the converse, that a Scotchman might refuse the intervention of a jury here, and insist on having the case tried, as in Scotland, by the Judge only. No one will contend in terms that the foreign rules of evidence should guide us in such cases ; and yet it is not so easy to avoid that principle in practice if you once admit, that, though the remedy is to be enforced in one country, it is to be enforced according to the laws which govern another country. Look to the rules of evidence, for example. In Scotland some instruments are probative ; in England, until after the lapse of thirty years, they do not prove themselves. In some countries, forty years are required for such a purpose ; in others thirty are sufficient. How then is the law to be ascertained which is to govern the particular case ? In one Court there must be a previous issue of fact ; in another, there need be no such issue. In the latter, then, the case must be given up as a question of evidence. Then come to the law. The question whether a parol agreement is to be given up or can be enforced, must be tried by the law of the country in which the law is set in motion to enforce the agreement. Again, whether payment is to be presumed or not, must depend on the law of that country, and so must all the questions of the admissibility of evidence, and that clearly brings us home to the question on the Statute of Limitations. Until the Act of Lord *Tenterden* (3 & 4 Will. IV. c. 27) a parol agreement or promise was sufficient to take the case out of the Statute of Limitations ; but that has never been the case in Scotland. It is not contended here that the practice of England is applicable to Scotland ; but these are illustrations of the inconvenience of applying one set of rules of law to an instrument which is to be enforced by a law of a different kind. It is said that the limitation is of the very nature of the contract. First, it is said that the party is bound for a given time, and for a given time only ; that is a strained construction of the obligation. The party does not bind himself for a particular period at all, but merely to do something on a certain day, or on one or other of certain days. In the case at the bar, the obligation is to pay a sum certain at a certain day, but the law does not suppose that he is

at the moment of making the contract contemplating the period at which he may be freed by lapse of time from performing it. The argument that the limitation is of the nature of the contract, supposes that the parties look only to the breach of the agreement. Nothing is more contrary to good faith than such a supposition. If the law of the country proceeds on the supposition that the contracting parties look only to the period at which the Statute of Limitations will begin to run, it will sanction a wrong course of conduct, and will turn a protection against laches into a premium upon evasiveness.

Then it is said, that by the law of Scotland not the remedy alone is taken away, but the debt itself is extinguished, and thus a distinction is relied on as taken by the law between an absolute prescription and the limitation provided by the statute. But it seems to me that there is no good ground for supposing such a distinction. I do not read the statute in that manner. The Act of 1772 is an act for the limitation of the enforcement of titles to bills and notes, and the enactments of it are strong with respect to the remedy to be enforced. The debt, however, is still supposed to be existing and owing.

It is not necessary to discuss the excellent distinction taken by Mr. Justice *Story* (Conflict of Laws, § 582), and approved of in the Court of Common Pleas in the case of *Huber v. Steiner* (1 Hod. 210; 2 Scott, 306; 2 Bing. N. C. 202), namely, that where statutes of limitation are held to govern the rights of parties, it must be where the parties are resident within the jurisdiction during the period. That may be taken as the ground of the decision of the Court in that case. But there is another principle to be considered, in which there are some Scotch cases that must not be overlooked. *Galbraith v. Cunningham* (Morr. 4430), in 1626, where a suit on an Irish bond, not executed according to the law of Scotland, was sustained in the Scotch Courts, is a case of this kind. There was another case of *Salton v. Salton*, in 1673 (id. 4431), on a bond made in France; and in both instances, the instrument being valid according to the law of the country where it was made, though not according to the law of Scotland, the suit was sustained. These cases show that in them it was considered that the law of the country where the instrument is made ought to prevail. But a contrary decision occurred in 1691, the Montrose case, and another, *Grey v. Grant*, in 1789 (id. 4474), which was brought before the Lords Commissioners, who then refused to admit in the Scotch

Courts such proof of a debt contracted in a foreign country as would have been sufficient proof in the country where the debt was contracted, but was not sufficient proof according to the law of Scotland. *Muir v. Muir*, decided in 1787, went to the same point. *Glyn v. Johnston* (8 Shaw & Dunlop, 889) seems to cast some doubt upon this point, as it was then held that the foreign law might be imported for such a purpose; and in *Gibson v. Stewart* (9 Shaw & Dunlop, 525) the same rule was adopted, but there the domicile of the debtor made the whole difference, which was clearly wrong. The grounds of the opinion in this case are to be found in the case of *Glyn v. Johnston*. From the judgment there, it appears that the whole of the *lex loci contractus* must be adopted from the foreign country. But it is to be observed that Lord *Craigie* (8 Shaw & Dun. 891) dissented from that judgment, saying that no evidence could be received except such as was allowed by the law of Scotland. The preference of the *lex loci solutionis* is derived from a sounder principle, that of the *lex fori*. The law of the domicile of the debtor comes from the same ground. The consideration of the forum prevails much more than any other throughout the cases, but it must be admitted that there is on the whole a conflict of the cases in the Scotch Courts. But though many of the Scotch authorities cannot well be reconciled with each other, the cases of *Taleyrand v. Boulanger* (3 Ves. 449) in Chancery, and of *Melan v. Fitzjames* (1 Bos. & Pull. 138) in the Common Pleas, furnish better guides for us; nor are those cases impugned by the principles to be drawn from *Groves v. Gordon* (Morr. 4511) or *Phillips v. Stamford* (Morr. 4503); *Groves v. Gordon* proceeds upon reasons which will not support the decision, and much reliance cannot be placed upon *Phillips v. Stamford*. All the Judges agreed, that it was not a case of traffic and of merchants the law of Scotland must decide, though they were divided on the main point of the case. *Della Valle v. The York Buildings Company* (id. 4472) is not an authority, for the question then arose upon different circumstances, namely, those of the debt being extinguished. The ground of the decision was, that the bond might be sued on in England, and therefore did not fall within the particular words of the statute of 1469 (Scotch Acts, vol. i. p. 95), which declares that certain bonds, etc., there mentioned "shall be of none avail."

Let us now see whether this was a French contract. Suppose a policy of insurance was effected in this country on a ship for a voyage from port to port in America, it could not be said that that was an

American debt. *Fawkes v. Aikin* and *Wray v. Wright* are wholly irreconcilable both with that which is now admitted to be law, and with the principle which I have stated. Then there are the cases of *Thomson v. Lythgoe* and *Renton v. Bayley*, in July, 1751, the latter of which is the case to which *Erskine* refers as settling the law. They were followed by *Macniel v. Macniel* in 1761, by *Randal v. Innes* (Morr. 4520) in 1768, and by *Ker v. Home* (id. 4522) in 1771, all of the same kind. All the authorities, Hubter de Conf. Leg. (De Confl. Leg. in Div. Imp.), Voet (Dig. Lib. 24, t. 3 s. 12), and Lord Kaimes (Principles of Equity, 3, 8, 6, 1, 5, 3), are cited in that case. *Campbell v. Steiner* (6 Dow, 116) was an action for a bill of costs for business done in this House. The Court below there allowed the rule of Scotch prescription. That judgment was affirmed by Lord *Eldon*, who however said that he moved it with regret. He said that it had been ruled that the debtor being in Scotland and the creditor in England, the debtor might plead the Scotch rule of prescription; that that was against some of the old authorities, but was in accordance with those of later date. That case cannot be reconciled with the principle that the *locus solutionis* is to prescribe the law. It has nothing to do with the case. Why is it, then, that the law of the domicile of the debtor was there allowed to prevent the plaintiff from recovering? It was because the creditor must follow the debtor, and must sue him where he resides, and by the necessity of that case, was obliged to sue him in Scotland. In that respect, therefore, there was in that case no difference between the *lex loci solutionis* and the *lex fori*; and it must be admitted that in such a case the rules of evidence, and if so, the rules of practice, may be varied as they are applied in one Court or the other. But governing all these cases, is the principle that *the law of the country where the contract is to be enforced must prevail in enforcing such contract, though it is conceded that the lex loci contractûs may be referred to for the purpose of expounding it*. If, therefore, the contract is made in one country to be performed in a second, and is enforced in a third, the law of the last alone, and not of the other two, will govern the case. In reversing the most material part of the interlocutor appealed from, you do not introduce the law of England or of the commercial world into Scotland, but you are renewing in Scotland the principles of the old law of that country. The appellant was an alien enemy in France, and could not appear in the French Courts; he was, too, out of the country, and he

could not possibly possess any property, real or personal, by which he could be rendered amenable.

But supposing that the debt might have been sued for in France, then comes the question, whether the French judgment cannot be sued on as a substantive cause of action. It is, in fact, tendered as one of the grounds of suit here. A foreign judgment is good here for such a purpose, provided that it has not been obtained by fraud, or collusion, or by a practice contrary to the principles of all law. *Fraser v. Sinclair* (Morr. 4543), which was affirmed in this House, showed that we regard a foreign judgment only as *prima facie* evidence of a debt. *Buchanan v. Rucker* (1 Campb. 63; 9 East, 192) established that the Court before which a foreign judgment is brought by a proceeding of this sort may examine whether it has been rightly obtained or not, and the principle of the decision cannot be confined to the case of a party not being within the jurisdiction at the time the judgment is obtained. If he is a foreigner, and is not within the jurisdiction, but is by force kept out of it before the action, and is not sued by proper forms, his case is even stronger than that of the defendant in *Buchanan v. Rucker*, and he must have the same principle applied to it. The case in the 4 Bing. (*Douglas v. Forrest*, 4 Bing. 686) shows how much the application of the rule is affected by circumstances. In that case, which was an action in an English Court on a Scotch judgment of horning against a Scotchman born, the Court guards itself against a general inference from the decision. The Chief Justice, in delivering the judgment of the Court, says (*Id.* 703), "We confine our judgment to a case where the party owed allegiance to the country in which the judgment was so given against him, and by the laws of which country his property was, at the time those judgments were given, protected." *Beckett v. Mac Carthy* (2 Barn. & Ad. 951) has been supposed to go to the verge of the law, but the defendant in that case held a public office in the very colony in which he was originally sued.

It cannot be doubted, that a foreign judgment is the same as to our right to examine into it in the Courts of this country, whether made in the absence of parties, or with both of them present, *in foro contentioso*.

On the whole of the case, my motion is to reverse the interlocutors of the 10th of June, 1835, and 20th of January, 1836, and to declare that the evidence of the sexennial prescription ought to

be sustained, and that it is not affected by the proceedings which have taken place in the French Court.

The following order was afterwards made and entered on the Journals :—

“ It is ordered and adjudged by the Lords, etc., that the said interlocutors, in so far as complained of in the said appeal, be, and the same are hereby reversed ; and it is declared that the defence of the sexennial prescription, according to the law of Scotland, ought to be sustained ; that this prescription has suffered no interruption by reason of the proceedings in the French Court ; that these proceedings do not constitute a new ground of debt, nor evidence of a debt independent of the bill libelled upon ; and that the debt can only be proved by the writ or oath of party, reserving all defences for the appellant ; and it is further *ordered and adjudged*, that with this declaration the cause be remitted back to the Court of Session in Scotland, to do therein as shall be just and consistent with this judgment.”

There are few subjects more interesting than that branch of private international jurisprudence so ably discussed by Lord *Brougham* in the principal case, which arises from the conflict of laws in matters relating to contracts,—a subject also of peculiar importance to a mercantile community engaged in transactions with people living under different laws in every part of the civilized world. This has been very clearly shown by Mr. Justice *Story* in his learned work upon the conflict of laws. “ It is easy to see,” writes that accomplished jurist, “ that in the common intercourse of different countries, many circumstances may be required to be taken into consideration before it can be clearly ascertained what is the true rule by which the validity, obligation, and interpretation

of contracts are to be governed. To make a contract valid, it is a universal principle, admitted by the whole world, that it should be made by parties capable to contract ; that it should be voluntary ; that it should be upon a sufficient consideration ; that it should be lawful in its nature ; and that it should be in its terms reasonably certain. But upon some of these points there is a diversity in the positive and customary laws of different nations. Persons capable in one country, are incapable by the laws of another ; considerations good in one country are insufficient or invalid in another ; the public policy of one country permits or favours certain agreements which are prohibited in another ; the forms prescribed by the laws of one country to ensure validity and ob-

ligation of contracts, are unknown to another; and the rights acknowledged by one country are not commensurate with those belonging to another. A person sometimes contracts in one country and is domiciled in another, and is to pay in a third; and sometimes the property which is the subject of the contract is situate in a fourth; and each of these countries may have different, and even opposite, laws affecting the subject-matter. What then is to be done in this conflict of laws? What law is to regulate the contract, either to determine the rights or the remedies, or the defences growing out of it, or the consequences flowing from it? What law is to interpret its terms, and ascertain the nature, character, and extent of its stipulations? Boullenois has very justly said, that these are questions of great importance, and embrace a wide extent of objects." Story, Conflict of Laws, § 232.

In examining the subject discussed in the principal case it is proposed to consider, 1st, by what law the capacity of persons contracting in a foreign country is governed; 2nd, by the law of what country the validity of a contract is to be determined; 3rd, by what law the form of a contract is to be regulated; 4th, according to what law is a contract to be construed; 5th, by what law the discharge or dissolution of contracts is governed; 6th, what law regulates the enforcement of contracts.

1. *By what Law the Capacity of*

a Person to contract is governed.—

Where a person enters into a contract in a foreign country, the question may be raised by what law is his capacity to enter into the contract to be determined? Is the *lex domicilii* or the *lex loci contractus* to govern? Without going into the question as to the validity of contracts of marriage in foreign countries (a subject not within the province of this work), we may observe that however diffuse and contradictory may be the opinions of foreign jurists, our own reports are very bare of authority upon this topic. It is said by Mr. Justice Story, "that foreign jurists generally hold that the law of the domicil ought to govern in regard to the capacity of persons to contract." Story, Conflict of Laws, § 241. Our own law appears to be different, for in a case decided at Nisi Prius it was held that the *lex loci contractus* is to govern in determining the capacity of a person to enter into a contract. The case alluded to is that of *Male v. Roberts*, 3 Esp. 163: there the plaintiff made an advance to the defendant, an infant (who appears to have had an English domicil) in order to enable him to pay a sum of money for which he had been arrested in Scotland under a writ of *fugé* for liquors supplied to him. An action having been brought in England for the money advanced to the use of the defendant, he set up the defence that he was an infant when the money was so advanced. The plaintiff, not having proved that by the law of Scotland

such a contract could be enforced against an infant, was nonsuited." And Lord *Eldon*, C. J., observed, "The law of the country where the contract arose must govern the contract; and what that law is should be given in evidence to me as a fact. No such evidence has been given; and I cannot take the fact of what that law is, without evidence."

In *Cosio and Pineyro v. De Bernales*, 1 C. & P. 266, Ry. & Moo. 102, the plaintiffs, husband and wife, domiciled in Spain and carrying on trade there as partners, brought an action of *assumpsit* against the defendants, merchants in London, to recover the balance of an account. The plaintiffs however were nonsuited, because by the law of England husband and wife could not join in such an action. But it seems that if it had been shown by evidence that in Spain a husband and wife could be partners, the action might have been maintained; for *Abbott*, C. J., said, "The plaintiff must give some evidence that by the law of Spain a feme-covert in that country is authorized to have separate property, and trade on her own account." It does not appear from the report, but it is presumed that the contract in respect of which the action was brought was entered into in Spain. See also *Stephens v. M'Farland*, 8 Ir. Eq. Rep. 444.

In a recent case, in which however, according to the report, neither *Male v. Roberts* nor *Cosio v. De Bernales* were cited, it was held

in the case of a married woman that her capacity to enter into a contract was to be governed by the law of her domicile. See *Guépratte v. Young*, 4 De Gex & Sm. 217: there Madame Guépratte, a married woman domiciled in France, entered into a contract in England respecting her reversionary interest in trust-money in the English funds to which she was entitled under a marriage settlement executed in France. It was held by Sir J. L. Knight Bruce, V.C., that although according to the law of England a married woman could not bind her reversionary interest in personal estate not settled to her separate use, yet that as Madame Guépratte's capacity to enter into the contract was to be determined by the law of France—the country of her domicile, it was binding upon her. "The French law," said his Honour, " (the law of the country of the marriage contract of M. and Madame Guépratte and of their domicile) was competent to give, and did here give the capacity, but permitted to the English law the form, which form was pursued and abided by."

At first sight it might seem that the rule laid down by Lord *Eldon* in *Male v. Roberts*, viz. that the capacity to enter into a contract is to be determined by the law of the country where the contract is made, was departed from in *Guépratte v. Young*. It may perhaps, however, be treated as an exception from the rule, and in this light the learned Vice-Chancellor appears to have viewed it, when he observes that

"it is notoriously of continual practice in the Court of Chancery, to deal with the personal property of married women domiciled elsewhere than in England, otherwise than it would be dealt with were they domiciled in England; to do so, merely by reason of the domicile. The law of the country of the domicile being attended to, a husband not domiciled here, often, as we all know, exercises powers and obtains benefits which an English husband could not." See 4 De G. & Sm. 233.

The cases alluded to by his Honour are those where husband and wife are domiciled in a foreign country, according to the law of which the husband is entitled to receive his wife's property without making any provision for her, for there the Court will, upon proof of the law of the domicile, order any money to which the wife is entitled in this country to be paid to her husband without requiring him to make any settlement. See 1 Lead. Cas. Eq. p. 385. The case of *Guépratte v. Young*, if it is opposed to *Male v. Roberts*, is supported by the opinion of Boullenois, cited by the learned Judge, "Bona mobilia sequi et regulari debent secundum statuta loci domicilii ejus ad quem pertinent vel spectant." Perhaps however the case of *Guépratte v. Young* may be said not to have determined any question relative to the capacity of a married woman to contract in this country with reference to or so as to affect herself personally, but to have decided that any contract which a married

woman may enter into in this country with reference to or so as to affect movables, which are considered as being at her place of domicile, must, as to her capacity to contract, be governed by the law of the domicile, and in this view *Guépratte v. Young* may not be inconsistent with *Male v. Roberts*.

2. *By the Law of what Country the Validity of a Contract is to be determined.*—As a general rule the validity of a contract (unless it is to be performed in another place) depends upon the law of the country where it is entered into. A good illustration of this rule is to be found in the case of *Trimbey v. Vignier* (1 Bing. N. C. 151, 4 Moore & Scott, 695). There a bill of exchange was made and indorsed in blank in France, the holder having sued the maker in England, it was held by the Court of Common Pleas, that the contract was governed by the law of France, and that as according to the law of France an indorsement in blank (differing in this respect from the law of England) does not pass the property to the holder, he could not recover upon the bill of exchange in this country. "The rule," said *Tindal*, C.J., "which applies to the case of contracts made in one country, and put in suit in the Courts of law of another country, appears to be this, that the interpretation of the contract must be governed by the law of the country where the contract was made—*lex loci contractus*. . . . Our Courts of law must take notice that the plain-

tiff could have no right to sue in his own name upon the contract in the Courts of the country where such contract was made; and that such being the case there, we must hold in our Courts that he can have no right of suing here." See also *Burrows v. Jemimo*, 2 Stra. 733; *Alves v. Hodgson*, 7 T. R. 241; *Sudlow v. The Dutch Rhenish Railway Company*, 21 Beav. 43.

But although a contract may be valid in the country where it was entered into, it will not be enforced in this country, if it is of an immoral character, or is made in fraud of the laws of this country. This subject was fully discussed in the case of *Holman v. Johnson* (1 Cowp. 841), where however the contract was held to be good upon the ground that the plaintiffs were not mixed up with the illegal conduct of the defendant, although they were aware of his intentions. There the plaintiffs, who were inhabitants of Dunkirk, sold and delivered a quantity of tea, for the price of which the action was brought, to the order of the defendant, knowing it was intended to be smuggled by him into England. They however had no concern in the smuggling scheme itself, but merely sold the tea to the defendant as they would have done to any other person in the ordinary course of their trade: it was held by Lord Mansfield, C.J., that they were entitled to recover the debt. "The question," said his Lordship, "is whether in this case the plaintiff's demand is founded upon the ground of any immoral act or contract, or upon

the ground of his being guilty of anything which is prohibited by a positive law of this country. An immoral contract it certainly is not; for the revenue laws themselves, as well as the offences against them, are all *positivi juris*. What then is the contract of the plaintiff? It is this: being a resident and inhabitant of Dunkirk together with his partner, who was born there, he sells a quantity of tea to the defendant, and delivers it at Dunkirk to the defendant's order, to be paid for in ready money there, or by bills drawn personally upon him in England. This is an action brought merely for goods sold and delivered at Dunkirk, and giving credit for them. The contract is complete, and nothing is left to be done. The seller, indeed, knows what the buyer is going to do with the goods, but has no concern in the transaction itself. It is not a bargain to be paid in case the vendee should succeed in landing the goods; but the interest of the vendor is totally at an end, and his contract complete by the delivery of the goods at Dunkirk. To what a dangerous extent would this go if it were to be held a crime! If contraband clothes are bought in France, and brought home hither, or if glass bought abroad, which ought to pay a great duty, is run into England, shall the French tailor or the glass-manufacturer stand to the risk or the loss attending their being run into England? Clearly not. Debt follows the person, and may be recovered in England, let the

contract of debt be made where it will; and the law allows a fiction for the sake of expediting the remedy. Therefore I am clearly of opinion, that the vendors of these goods are not guilty of any offence, nor have they transgressed against the provisions of any Act of Parliament. I am very glad the old books have been looked into. The doctrine Huberus lays down, is founded in good sense, and upon general principles of justice. I entirely agree with him. He puts the general case in question thus (Tit. De Conflictu Legum, vol. ii. p. 539): "*In certo loco merces quædam prohibita sunt. Si vendantur ibi, contractus est nullus. Verum, si merx eadem alibi sit vendita, ubi non erat interdicta, emptor condemnabitur, quia contractus inde ab initio validus fuit.*" Translated it might be rendered thus: In England, tea which has not paid duty is prohibited, and if sold there the contract is null and void. But if sold and delivered at a place where it is not prohibited, as at Dunkirk, and an action is brought for the price of it in England, the buyer shall be condemned to pay the price; because the original contract was good and valid. He goes on thus: "*Verum si merces vendita in altero loco, ubi prohibita sunt, essent tradenda, jam non fieret condemnatio, quia repugnaret hoc juri et commodo reipublicæ quæ merces prohibuit.*" Apply this in the same manner,—*But if the goods sold were to be delivered in England, where they are prohibited, the*

contract is void, and the buyer shall not bring an action for the price, because it would be an inconvenience and prejudice to the state if such an action could be maintained.

The gist of the whole turns upon this; that the conclusive delivery was at Dunkirk. If the defendant had bespoke the tea at Dunkirk to be sent to England at a certain price, and the plaintiff had undertaken to send it into England, or had had any concern in the running it into England, he would have been an offender against the laws of this country. But upon the facts of the case, from the first to the last, he clearly has offended against no law of England." See also *Pellecat v. Angell*, 2 Crompt. & R. 811.

It is clear therefore that if in *Holman v. Johnson* the goods had been smuggled into England in pursuance of a contract or of any act done by the vendors to enable the defendant to smuggle such goods, the plaintiffs would have been unsuccessful in their action, because although such contract would have been valid by the law of France (as no nations pay any regard to the revenue laws of other nations), yet as it would have been prejudicial to this country and made in fraud of its laws, our Courts would not have lent their assistance to enforce it. Thus in *Waymell v. Reed*, 5 T. R. 599, the plaintiff, a foreigner, living at Lisle, sold the defendants a quantity of lace, which he knew was intended to be smuggled into England, and for that purpose it was packed up for them,

pursuant to their direction, in a peculiar manner, for its more easy conveyance without discovery. It was held by the Court of King's Bench, that the plaintiff could not recover the value of the goods. "It is not necessary," said Lord *Kenyon*, "to inquire now whether or not it be immoral for a native of one country to enter into a contract with the subject of another, to assist the latter in defrauding the revenue laws of his country? It is sufficient, in order to dispose of this case, to advert to the distinction laid down by Lord *Mansfield* in *Holman v. Johnson* (1 Cowp. 341, ante, p. 231), to which I entirely subscribe, that where the contract and delivery of goods are complete abroad, and the seller does no act to assist the smuggling them into this country, such a contract is valid, and may be recovered upon here. But here the plaintiff was concerned in giving assistance to the defendants to smuggle the goods, by packing them in the manner most suitable for, and with intent to aid that purpose. He cannot therefore resort to the laws of this country to assist him in carrying this contract into execution." What was said by Lord *Mansfield* at the end of *Holman v. Johnson* comes up to the present case. See also *Clugas v. Penaluna*, 4 T. R. 466; *Biggs v. Lawrence*, 3 T. R. 454. Mr. Justice *Story*, in his *Conflict of Laws*, states that "there seems a strong inclination in the Courts of law to hold, that if a contract is made in foreign parts by a citizen or subject of a country for the sale of goods

which he knows are to be smuggled in violation of the laws of his own country, he shall not be permitted to enforce it in the Courts of his own country, although the contract of sale is complete, and might be enforced in the like case of a foreigner." § 255. It is presumed the learned writer means that mere knowledge of, without any overt act of assistance in effecting, a fraud upon the laws of a country, although it would not be a bar to a foreigner, might preclude a subject from proceeding in the Courts of such country to enforce a contract. The English cases cited, notwithstanding the *dicta* of some of the Judges, seem scarcely to bear out the supposed distinction, for in the first of them, *Biggs v. Lawrence*, 3 T. R. 454, 457, it appears that the goods supplied in Guernsey, viz. spirits, "were sent in slings and half-ankers, ready for smuggling;" and in the second case, *Clugas v. Penaluna*, 4 T. R. 466, 468, which also arose upon spirits sold in Guernsey, "the plaintiff was assisting in the act of smuggling, by means of packing the goods; for the spirits were delivered in ankers which are used for the purpose of smuggling." The overt acts therefore in these two cases clearly brought them within the principle of the case of *Waymell v. Reed*.

The distinction, however, alluded to was certainly taken by some of the learned Judges in the two last-mentioned cases, although it was not material to the decisions. And with reference to it, *Story* justly observes, "The truer doctrine

would seem to be, to make no distinction whatsoever between the case of a sale between citizens or subjects, and the case of a sale between foreigners; but to hold the contract in each case to be utterly incapable of being enforced, at least in the Courts of the country whose laws are thus designedly sought to be violated. Sound morals and a due regard to international justice seem equally to approve such a conclusion." *Stor. Confl. Laws*, § 255.

But a contract will be valid in this country although it may be entered into in evasion of the revenue laws of another country. See *Boucher v. Lawson*, Ca. t. Hardw. 85; *Lever v. Fletcher*, 1 Park. Mar. Ins. 506; *Planché v. Fletcher*, 1 Doug. 251; *Simeon v. Bazett*, 2 Mau. & S. 94; S. C., on appeal, nom. *Bazett v. Meyer*, 5 Taunt. 824; *Sharp v. Taylor*, 2 Phil. Ch. Rep. 801.

If a contract entered into in a foreign country be contrary to morality, it cannot be enforced in the Courts of this country, even although it might have been enforced in the country where it was made. "In many countries," says Lord *Mansfield*, "a contract may be maintained by a courtesan for the price of her prostitution; and one may suppose such an action to be brought here, upon such a contract which arose in such a country; but that would not be allowed in this country." *Robinson v. Bland*, 2 Burr. 1084.

Although gambling debts contracted in this country, as well as

securities given for them, even in a foreign country, are void and cannot be recovered in this country (*Wynne v. Callander*, 1 Russ. 293), nevertheless it seems that gambling of itself is not considered to be so contrary to morality, as to prevent money won at play, or lent for the purpose of gambling, in a country where the games in question are not illegal, from being recovered in the Courts of this country. See *Quarrier v. Colston*, 1 Phil. Ch. Rep. 147. But see and consider the remarks of Lord *Mansfield*, C.J., in *Robinson v. Bland*, 2 Burr. 1077.

Another class of contracts entered into abroad may be here noticed, which our Courts will not enforce on account of their being contrary to public policy, viz. where subjects of our own country enter into engagements abroad, to raise money to support the subjects of a Government in amity with our own, in hostilities against their own Government (*De Wütz v. Hendricks*, 2 Bing. 814; 9 J. B. Moore, 586; *Jones v. Garcia Del Rio*, 1 T. & R. 297); so likewise where a contract is entered into with a country not recognized by this country, our Courts will not take any step to enforce it. *Thompson v. Powles*, 2 Sim. 194; *Taylor v. Barclay*, ib. 213; *Jones v. Garcia Del Rio*, 1 T. & R. 297, 299; and see *Macnamara v. D'Evereux*, 8 L. J. Ch. 156.

As in our law slavery is not recognized, but is considered "against the law of nature and the law of God," our Courts will not entertain any action upon con-

tracts for the sale of slaves, although they have been entered into in a country where slaves are saleable by law, and slavery is "a domestic institution." See *Forbes v. Cochrane*, 2 B. & Cress. 470, 471, where *Best, J.*, makes the following spirited remarks:—"It is a matter of pride to me to recollect that whilst economists and politicians were recommending to the legislature the protection of the traffic in slaves, and senators were framing statutes for its promotion, and declaring it a benefit to the country, the Judges of the land, above the age in which they lived, standing upon the high ground of natural right, and disdaining to bend to the lower doctrine of expediency, declared that slavery was inconsistent with the genius of the English constitution, and that human beings could not be the subject-matter of property. As a lawyer, I speak of that early determination (*Somerset's case*, Loft's Rep. 1; 20 Howell's State Trials 79), when a different doctrine was prevailing in the senate, with a considerable degree of professional pride. I say there is not any decided case in which the power to maintain an action arising out of the relation of master and slave has been recognized in this country. I am aware of the case in *Levinz (Butts v. Penny)*, 2 Lev. 201, but there the question was never decided, and if it had, in the case of *Smith v. Gould* (2 Ld. Raym. 1274) the whole Court declared that the opinion there expressed is not law. And the same had

before been said by Lord *Holt* in the case of *Chamberlain v. Harvey* (1 Ld. Raym. 146). The case of *Smith v. Brown and Cooper* (2 Salk. 666) has been misunderstood. It has been supposed to establish the position, that an action may be maintained here for the price of a negro, provided the sale took place in a country where negroes were saleable by law. But that point was not decided."

But as the slave-trade is not contrary to international law, or what may be termed the common law of nations, it has been held that a foreigner who is not prohibited from carrying on the slave-trade by the laws of his own country, may in a British Court of justice recover damages sustained by him in respect of the wrongful seizure, by a British subject, of a cargo of slaves on board of a ship then employed by him in carrying on the African slave-trade. *Madrazo v. Willes*, 3 B. & Ald. 353.

3. *By what Law the Form of a Contract is to be regulated.*—A contract made in a foreign country will not be enforced elsewhere, unless it is executed with the forms and solemnities required by such country, for a compliance with them can be deemed as the only criterion of the intention to enter into such contract. *Warrender v. Warrender*, 9 Bligh, 111. Thus it was held, in *Alves v. Hodgson* (7 T. R. 241), by the Court of King's Bench, that a man could not recover upon an unstamped promissory note given in Jamaica, the laws of

which country required a stamp. "It is said," observed Lord *Kenyon*, "that we cannot take notice of the revenue laws of a foreign country; but I think we must resort to the laws of the country in which the note was made, and unless it be good there, it is not obligatory in a Court of law here." See also *Clegg v. Levy*, 3 Camp. 166. In the two subsequent cases of *Wynne v. Jackson*, 2 Russ. 351, and *James v. Catherwood*, 3 Dowl. & Ry. 190, it was held, that though a stamp was requisite in a foreign country, its absence from a document upon which proceedings were taken in this country was immaterial. In the latter case, Lord *Tenterden*, C. J., observed, "It has been settled, or at least considered as settled ever since the time of Lord *Hardwicke*, that in a British Court we cannot take notice of the revenue laws of a foreign state. It would be productive of prodigious inconvenience, if in every case in which an instrument was executed in a foreign country, we were to receive in evidence what the law of that country was, in order to ascertain whether the instrument was or was not valid."

With reference to the observations of the learned Judge in this case, it is perfectly true that in this country it is no objection to the validity of a contract that it offends against the revenue laws of another country, as in the case of smuggling; but in the case under discussion, the question is whether the instrument has been executed with all the formalities required by

law of the place where the contract is entered into; and with respect to the objection of the inconvenience of receiving in evidence what the law of that country is, in order to ascertain whether the instrument is or is not valid, that falls entirely to the ground, for that would be merely to ascertain a fact which the Courts are continually in the habit of doing. See *Story*, Conflict of Laws, § 260 n. In the recent case of *Bristow v. Sequerville*, 5 Exch. 275, an action was brought to recover back £200 paid by the plaintiff to the defendant for shares in a projected mining company in Westphalia. At the trial, *Alderson*, B., admitted unstamped receipts put in by the plaintiff to prove the payment of the purchase-money, the learned Judge at the same time expressing an opinion that it had not sufficiently been proved that by the law in force where the receipts were given they would be inadmissible for want of a stamp. On motion a rule for a new trial was refused, *Rolfe*, B., observing, "I agree that if for want of a stamp a contract made in a foreign country is void, it cannot be enforced here. But if *Alves v. Hodgson* meant to decide that where a stamp is required by the revenue laws of a foreign state before a document can be received in evidence there, it is inadmissible in this country, I entirely disagree."

A striking illustration of the rule is to be found in *Guépratte v. Young*, 4 De Gex & Sm. 217, where a married woman and her husband,

domiciled in France, entered into a contract in England with respect to an interest in the English funds belonging to the wife. The contract, though duly executed as required by the English law, did not comply with the formalities prescribed by the French law, which requires that there should be as many original instruments as there are distinct parties to the contract. It was held however by Sir *J. L. Knight Bruce*, V. C., that the English law regulated the form of the contract, and that it was therefore valid. See also *Benham v. Mornington*, 3 C. B. 183.

4. According to what Law is a foreign Contract to be construed.—

Assuming that a contract entered into in a foreign country is such as there is no objection towards enforcing in another, the question next arises, according to what rule is the contract to be there construed? and it appears to be clear that the law of the country where the contract was entered into must furnish the rule both as to its nature, and extent of obligation, and interpretation. *Fergusson v. Fyffe*, 8 C. & F. 140; see also *Campbell v. Dent*, 2 Moo. P. C. C. 292.

With regard to the law of the country furnishing us with the rule for ascertaining the nature of a contract, we may cite the case of *Burrows v. Jemino* (2 Str. 738; 2 Eq. Cas. Ab. 526); there a bill having been drawn upon a person at Leghorn, he accepted it; the drawer having failed, the acceptor discharged himself of the accept-

ance by a suit instituted at Leghorn, whereby his acceptance was vacated, inasmuch as, according to the law of that country (differing from the law of England, by which an acceptor is liable in all events), if a bill be accepted and the drawer fails, and the acceptor has not sufficient effects of the drawer in his hands at the time of the acceptance, the acceptance becomes void. Proceedings having been taken in England, Lord Chancellor *King* was of opinion, that the cause was to be determined according to the local laws of the place where the bill was negotiated, and the acceptance of the bill having been vacated and declared void by a competent jurisdiction, he thought that sentence was conclusive and bound the Courts here. See also *Allen v. Kemble*, 6 Moo. P. C. C. 314.

The extent of the obligation to which a person renders himself liable by a contract, will depend upon the law of the country where he enters into it, and not upon the law of the country where he seeks to enforce it. For instance, if a person entitled to a Scotch heritable bond, which is a primary charge upon realty in that country, were to obtain payment from the heir, the latter would not be able to take proceedings in England to be exonerated out of the personal estate there (*Drummond v. Drummond*, 6 Bro. P. C. 601, Toml. ed.; *Elliott v. Lord Minto*, 6 Madd. 16), although it is clear that in the case of an English bond or a Scotch movable debt paid out of the proceeds of Scotch realty, the heir

would be entitled to ask for exoneration out of personal assets of the debtor administered in England. *Earl of Winchelsea v. Garrett*, 2 Keen, 293.

Again, if by the law of the country where a contract is made, no personal obligation is created, but a right only is conferred of proceeding *in rem*, such contract will not be held to raise a personal obligation in the country where the contract is enforced. *Melan v. The Duke de Fitzjames*, 1 Bos. & Pull. 138, 141, 142, 143.

Upon the same principle, inasmuch as by the law of France an indorsement in blank does not transfer any property in a bill of exchange, it was held in the Court of Common Pleas, in *Trimbey v. Vignier*, 1 Bing. N. C. 151, that the holder of a bill drawn in France and indorsed there in blank cannot recover against the acceptor. "The question," said *Tindal*, C.J., "is whether the law of France, by which the indorsement in blank does not operate as a transfer of the note, is a rule which governs and regulates the interpretation of the contract, or only relates to the mode of instituting and conducting the suit; for in the former case it must be adopted by our Courts; in the latter it may be altogether disregarded, and the suit commenced in the name of the present plaintiff. And we think the French law on the point above mentioned is the law by which the contract is governed, and not the law which regulates the mode of suing. If the indorsement has not

operated as a transfer, that goes directly to the point that there is no contract upon which the plaintiff can sue. Indeed the difference in the consequences that would follow, if the plaintiff sues in his own name or is compelled to use the name of the former indorser as the plaintiff by procuration, would be very great in many respects, particularly in its bearing on the law of set-off; and with reference to those consequences we think the law of France falls in with the distinction above laid down, that it is a law which governs the contract itself, not merely the mode of suing. We therefore think that our Courts of law must take notice that the plaintiff could have no right to sue in his own name upon the contract in the Courts of the country where such contract was made; and that such being the case there, we must hold in our Courts that he can have no right of suing here." See also *Cooper v. The Earl of Waldegrave*, 2 Beav. 282; *Allen v. Kemble*, 6 Moo. P. C. C. 814.

As a general rule, when a contract made in one country is put in suit in the Courts of law of another country, the interpretation of the contract must be governed by the law of the country where the contract was made. Per *Tindal*, C. J., in *Trimbey v. Vignier*, 1 Bing. N. C. 159. See also *De la Vega v. Vianna*, 1 B. & Ad. 284; *British Linen Company v. Drummond*, 10 B. & C. 903. For instance, where a bill drawn in Ireland was sued upon in England at a time when

the currency of the two countries was different, it was held that the sum was payable in Irish currency. See *Kearney v. King*, 2 Barn. & Ald. 301; *Sproule v. Legge*, 1 B. & Cress. 16. So likewise, "in the case of a bill drawn at A., it *prima facie* bears interest as a debt at A. would do if nothing else appear." Per *Alderson*, B., 9 Exch. 31.

The country where a bill of exchange is signed and indorsed, is the place of the contract, although blanks in it may be filled up in another country. Thus, in *Snaith v. Mingay*, 1 Mau. & Selw. 87, where Bailey and Co., partners, resident in Ireland, signed and indorsed a copperplate impression of a bill of exchange, leaving blanks for the date, sum, time when payable, and name of the drawee, and transmitted it to B. in England for his use, who filled up the blanks and negotiated it, the Court of King's Bench held that this was to be considered a bill of exchange by relation from the time of the signing and indorsing in Ireland, and consequently that an English stamp was not necessary. "The only act," said *Bailey*, J., "to pledge the credit of the house of Bailey and Co. was the signature in Ireland. Suppose the person subscribing his name as drawer had died whilst the bill was on its passage, and afterwards the blanks had been filled up and the bill negotiated to an innocent indorsee, I should think that in that case the representatives of the party signing the bill would have been liable. This shows, that where the

whole is filled up, it has reference to the time of the signature, which in this case was made in Ireland."

Upon the same principle, in *Barker v. Sterne*, 9 Exch. 684, where a person in Bavaria signed as drawer a bill of exchange, and sent it with a consignment of goods to his correspondent in London for acceptance by the purchaser of the goods, and the correspondent having filled up the blanks by inserting the date, amount, etc., and having got the bill accepted by the defendant, applied it to his own purposes when it was *bonâ fide* indorsed to the plaintiffs, it was held by the Court of Exchequer that the bill was not an inland bill, and therefore did not require a stamp.

Where however parties enter into a contract in one country to be performed in another, that contract, as to its validity, nature, obligation, and interpretation, will be governed by the law of the place of performance. Stor. Conflict of Laws, § 280. "The law of the place," says Lord *Mansfield*, C. J., "can never be the rule, where the transaction is entered into with express view to the law of another country, as the rule by which it is to be governed." *Robinson v. Bland*, 2 Burr. 1078; *Duncan v. Camnan*, 18 Beav. 128; 7 De G. Mac. & G. 78; *Este v. Smyth*, 18 Beav. 112; *Fife v. Round*, 6 W. R. 282.

Thus, although as a general rule, interest will be paid upon a contract according to the rate of interest where it was made, if it is to

be performed elsewhere, the rate of interest will be governed by the law of the place of performance. See *Conner v. Bellamont*, 2 Atk. 382; *Ranelagh v. Champante*, 2 Vern. 395; *Ekins v. East India Company*, 1 P. Wm. 395; *Cash v. Kennion*, 11 Ves. 314; *Robinson v. Bland*, 2 Burr. 1077; *Montgomery v. Budge*, 2 Dow & C. 297; *Fergusson v. Fyffe*, 8 C. & F. 121, 140; see also *Arnott v. Redfern*, 2 Carr. & P. 88. In this we follow the Roman law, where it is laid down, "usurarum modus ex more regionis, ubi contractum est, constituitur." Dig. Lib. 22, tit. 1, l. 1.

So if a bill drawn at A. be indorsed at B., the indorser is a new drawer, and it may be a question whether this indorsement is a new drawing of a bill at B., or only a new drawing of the same bill, that is, a bill expressly made at A. In the former case it would carry interest at the rate at B., in the latter at the rate at A. On this subject we find a difference of opinion in the books, Mr. Justice Story (*Conflict of Laws*, § 314) maintaining the former, and Pardessus (*Cours de Droit Commercial*, pt. 7, tit. vii. c. 2, art. 1500) the latter opinion. Per *Alderson*, B., in *Gibbs v. Fremont*, 9 Exch. 81.

Where however a bill of exchange is drawn in one country and is payable in another, if the bill is dishonoured, the drawer is liable according to the *lex loci contractus*, and not the law of the country where the bill was made payable. Thus, in *Allen v. Kem-*

ble (6 Moore, P. C. C. 314), Mr. Carberry, who resided in Demerara, drew a bill in favour of Mr. Allen, who also resided there, payable in London, upon Mr. Mackie, addressed to him at Stranmaer in Scotland, where he was residing. Mackie accepted the bill, making it payable in London. Allen indorsed the bill to a firm, who afterwards indorsed it to Mr. Troughton, who shortly afterwards became bankrupt. When Mackie's acceptance became due, he held two bills of exchange accepted by Troughton, which were dishonoured and protested for non-payment. Troughton's assignees did not proceed against Mackie, but brought an action in Demerara against Carberry and Allen, the drawer and indorser, who pleaded a right of set-off to the extent of the two bills accepted by Troughton, which the Supreme Court disallowed and found for the plaintiffs. It was held, by the Judicial Committee of the Privy Council reversing such sentence:—First, that the bill having been drawn in Demerara, the Dutch-Roman law in force in that colony must govern the case, and that by that law the bill accepted by Mackie was compensated or extinguished *pro tanto* by the bills accepted by Troughton; secondly, that a surety was entitled to avail himself of this rule of law, in respect of a debt due to the principal debtor; and thirdly, that the drawer and indorser were to be deemed sureties for the acceptor, and entitled to plead this right of set-off. "The appellants," said the Right

Hon. *T. Pemberton Leigh*, in delivering judgment, "contend that their liabilities are to be governed by the Roman-Dutch law which prevails in Demerara, where the bill was clearly made and signed by Carberry. It does not appear in evidence when the indorsement by Allen was made, but as Carberry's defence, that the bills are actually paid *pro tanto*, must, if it prevails, protect Allen, the indorser also, this is not material. The appellants then contend, that the principle of compensation, in the civil law, is adopted by the Roman-Dutch law, and applied to bills of exchange; that by the effect of this principle, a debt due by a creditor is compensated, or, in other words, extinguished by a liquid debt, of the same amount due from the creditor to the debtor; that the law operates an extinguishment of the one debt by the other; that a surety is entitled to avail himself of this rule of law, in respect of a debt due to the principal debtor; and that the drawer and indorser of a bill of exchange are deemed sureties for the acceptor, and are entitled to the benefit of this rule. To support this doctrine, various authorities were cited from Pothier, Vander Linden, Heineccius, and other treatises, which appear to us satisfactorily to establish the proposition contended for.

"These propositions were not much disputed by the respondents, nor was it denied that when a bill is drawn generally, the liabilities of the drawer, acceptor, and indorser, respectively, must be governed by

the laws of the countries in which the drawing, acceptance, and indorsement respectively took place. But it was contended, that when payment is to be made, in a place different from that where the contract is made the parties must be held to have contracted with reference to the law of the place of payment, and not of the place of contract, according to the maxim of the civil law, '*Contraxisse unusquisque in eo loco intelligitur in quo ut solveret, se obligavit.*' And it is argued, that this bill being drawn payable in London, not only the acceptor, but the drawer, must be held to have contracted with reference to the English law.

"This argument, however, appears to us to be founded on a misapprehension of the obligation which the drawer and indorser of a bill incurs. The drawer, by his contract, undertakes that the drawee shall accept and shall afterwards pay the bill, according to its tenor, at the place and domicile of the drawee if it be drawn and accepted generally; at the place appointed for payment, if it be drawn and accepted payable at a different place from the place of domicile of the drawee. If this contract of the drawer be broken by the drawee, either by non-acceptance or non-payment, the drawer is liable for payment of the bill, not where the bill was to be paid by the drawee, but where he, the drawer, made his contract, with his interest, damages, and costs, as the law of the country where he contracted may allow. In every case of a bill

drawn in one country upon a drawee in another, the intention and the agreement are, that the bill shall be paid in the country upon which it is drawn. But it is admitted, that if this payment be not so made, the drawer is liable, according to the laws of the country where the bill was drawn, and not of the country upon which the bill was drawn. What, then, is the consequence of altering, in the bill itself and by the acceptance, the place at which the acceptor is bound to pay? Can it be more than this, that, as to the acceptor the *locus solutionis* is altered, and, therefore, as to him, the *lex loci solutionis* is altered? But how does this affect the liabilities of the other parties? These bills are addressed to Mr. Mackie, Stranmaer, Scotland; if no place of payment had been mentioned, they would have been payable by the drawee, according to the law of Scotland. London being fixed as the place of payment, they are payable by the drawee according to the law of England; a different law is imported as regards the acceptor, but not as affects other parties." See also *Robinson v. Bland*, 1 W. B. 234, 256, & 2 Burr. 1077; *Cooper v. The Earl of Waldegrave*, 2 Beav. 282; *Rothschild v. Currie*, 1 Q.B. 48.

Upon the same principle, in *Gibbs v. Fremont*, 9 Exch. 25, where a bill of exchange, on the face of which no interest was reserved, was drawn in one country payable in another, it was held upon the dishonour of the bill by the drawee that the drawer was

liable to pay interest at the current rate in the country where the bill was drawn.

But if a bill of exchange be made in one country and indorsed in another, and again indorsed by a second indorser in a third, the rate of interest in the shape of damages upon the dishonour of the bill will be against each party according to the law of the place where his own contract had its origin, either by making or by indorsing the bill. Stor. Conflict of Laws, § 307, § 314. "It has been sometimes suggested," observes Mr. Justice Story, "that this doctrine is a departure from the rule that the law of the place of payment is to govern; but, correctly considered, it is entirely in conformity to the rule. The drawer and indorsers do not contract to pay the money in the foreign place on which the bill is drawn, but only to guarantee its acceptance and payment in that place by the drawer; and in default of such payment they agree upon due notice to reimburse the holder, in principal and damages, where they respectively entered into the contract." Story, Conflict of Laws, § 315. This subject was much discussed in the case of *Cooper v. The Earl of Waldegrave*, 2 Beav. 282: there a bill was drawn and accepted in Paris, where the drawer and acceptor were living, and made payable in England. No rate of interest was expressed to be payable on the bill. It was held by Lord Langdale, M. R., that interest was payable according to the English and not French law. "The

contract of the acceptor," said his Lordship, "which alone is now to be considered, is to pay in England; the nonpayment of the money when the bill becomes due is a breach in England of the contract which was to be performed in England. Upon this breach the right to damages or interest immediately accrues; interest is given as compensation for the nonpayment in England, and for the delay of payment suffered in England; and I think that the law of England, *i.e.* the law of the place where the default has happened, must govern the allowance of interest which arises out of that default; and consequently that the exception which relates to the interest is well founded. At the time when there is a breach of the contract of the acceptor by nonpayment in the country where payment is contracted to be made, there may be a contemporaneous breach of contract by the drawer or indorser in the country where the contract was entered into,—where the bill was drawn and the indorsement made; and the consequences of that breach of contract may be governed by the law of the country where it takes place."

Upon the same principle, the validity of a contract as to whether it is usurious or not will depend upon the law of the country where it is made and is to be executed. Thus, in *Thompson v. Powles*, 2 Sim. 194, where (previous to the abolition of the usury laws in this country) bonds had been given for a foreign republic (where such rate

of interest was valid) at six per cent. interest as a loan, and an objection was raised as to the bonds being usurious, Sir *L. Shadwell*, V. C., said, "With respect to the question of usury, in order to hold the contract to be usurious, it must appear that the contract was made here, and that the consideration for it was to be paid here. It should appear, at least, that the payment was not to be made abroad; for, if it was to be made abroad, it would not be usurious." See also *Yrisarri v. Clement*, 2 Carr. & P. 223.

In *Harvey v. Archbold* (Ry. & Mood. 184, 3 B. & C. 626) the plaintiffs, a firm in England, consigned goods to the defendants, a firm at Gibraltar, to be sold on commission. The defendants, as soon as the bills of lading and invoices were delivered to their agents in London, advanced through them to the plaintiffs two-thirds of the invoice price of the goods, by bills at ninety days, and for these advances received interest at the rate of six per cent., calculated from the date of the bills, *which was the usual rate of interest at Gibraltar*. In an action for the proceeds of the goods it was held by the Court of King's Bench that this could not be considered as a loan of money in England, but anticipated payments, and that the whole must be taken as a Gibraltar transaction, to which the usury laws of England were not applicable.

Where the place of payment or performance is not the same as that of the contract, a rate of interest

may be stipulated for, legal at the former place, although it would be illegal as usurious at the latter. Stor. Conf. Law, § 296.

It must be remembered that our own laws against usury have been repealed.

Where damages are recovered for a breach of contract *ex mero*, the rate of interest allowed in a suit will be according to the *lex loci contractus*. *Ekins v. East India Company*, 1 P. Wms. 394, 396. Stor. Conf. of Laws, § 307.

Where a contract is made in one country, by which a sum is payable according to the currency of that country, and legal proceedings are afterwards taken in another country where the currency differs, to recover the money due upon the contract, the question sometimes arises, how is the amount of the debt to be ascertained,—whether by the ordinary relative value of the respective currencies when at par, or by the rate of exchange at the particular time? It has been held that the latter is the correct mode of making the computation. Thus, in *Scott v. Bevan*, 2 B. & Ad. 78, on the 1st of October, 1827, a judgment had been recovered in Jamaica for £1554. 16s. 8d. current money of that island, with interest on that sum from the 31st of December, 1825, and also £8. 19s. 8½d. current money for his costs. The plaintiff brought an action in England for the sum of £1117. 0s. 3d., the alleged value of the damages, costs, and charges so recovered, and for £116. 13s. 1d. interest

thereon; £1102. 7s. 8d. was paid into Court. The plaintiff proved that £140 currency, taking the rate of exchange at par, was equivalent in value to £100 sterling. The defendant proved that on the 1st of October, 1827, when the judgment was obtained, and thence to the commencement of the action, bills upon England were in Jamaica at a premium of 22½ per cent.; £100 sterling at that rate being worth £171 currency; but taking the exchange at 19 per cent. (which was 3½ less than the actual exchange), the value of £100 sterling was £166. 12s., and £1836. 10s. 8d.—being the amount of the principal sum recovered and costs, together with interest at six per cent. from the 31st of December, 1825, to the 2nd of December, 1828, when the money was paid into Court—was in sterling money £1102. 7s. 3d. It was held by the Court of King's Bench that the sum claimed by the plaintiff ought to be calculated according to the value of the sum recovered in Jamaica in sterling money, which the currency would have produced according to the actual rate of exchange between Jamaica and England at the date of the judgment. "The plaintiff," said Lord *Tenterden*, C. J., "contended that the value of the sum recovered should be estimated as £140 currency to £100. sterling, without regard to the rate of exchange at any particular time; the defendant, that it should be estimated according to the exchange; and the payment upon that supposition

was more than sufficient, taking the rate of exchange at the commencement of the action, or for some time before or afterwards. The practice has probably been in favour of the plaintiff; but there is no case that decides the question. Upon the whole, we think the defendant's mode of computation approximates most nearly to a payment in Jamaica in the currency of that island; though speaking for myself personally, I must say that I still hesitate as to the propriety of this conclusion.

"The proportion of £140 to £100 enters into every calculation; when bills in Jamaica are at a premium, a bill drawn upon England for £100 may be sold and turned into currency at Jamaica for more than £140. If such bills are at a discount, a bill for £100 will sell for and produce less than £140. Such bills were at some premium at the time of the judgment recovered and at all times since. And it is true, undoubtedly, that if the plaintiff should wish to send the money that he may receive under the judgment of this Court to Jamaica, where the money was originally due and recovered by the judgment in that island, the mode to be adopted, according to the most general and practicable, if not the only usage, would be to get some person resident in that island to draw upon him for the amount of the sterling money recovered here; and this might be done by bills drawn at the exchange on which the defendant relies, and which is at the rate

of more than £140, namely, about £160 currency to £100 sterling; so that a less number of hundred of pounds sterling than in the proportion of £140 to £100 would place him in the situation of receiving his principal and interest, viz. £1836. 10s. 8d. currency in the island of Jamaica." See also *Delegal v. Naylor*, 7 Bing. 460; *The Earl of Duncannon v. Hurkell*, 1 Eq. Ca. Ab. 288; *Ekins v. The East India Company*, 1 P. Wms. 395, 2 Bro. P. C. 382, Toml. ed.; *The Marchioness of Lansdowne v. The Marquis of Lansdowne*, 2 Bligh, P. C. 60; *Cockerell v. Barber*, 16 Ves. 461.

The principle before laid down appears to be adverse to a well-known case in Davys' Reports, p. 18 (*Le Case de mixt moneys*). There, Brett, a Drogheda merchant, having bought some goods from one Gilbert, in London, entered into a bond there to pay Gilbert in Dublin at a certain day the sum of £100 of current and lawful money of England. In the intervening time Queen Elizabeth by proclamation recalled the existing currency in Ireland, and issued a new and debased coinage (called mixed money), declaring it to be the legal and current money of Ireland. Brett tendered £100 of the mixed or debased coin in Dublin in performance of the condition of the bond. The question raised before the Privy Council of Ireland was whether the tender was good, or whether the £100 ought not to have been paid in other or better coin, than the mixed moneys, ac-

cording to their rate and value, at the time of the tender. It was held by the Council that the tender was good, because although the mixed money was made current in the realm of Ireland only, it would nevertheless be considered current and legal money of England, as Ireland was only a member of the Imperial Crown of England, and moreover at the time of the tender in Dublin there was no other currency in Ireland than the mixed money.

The subject of the depreciation of the currency, in the time intervening between the contracting of a liability and payment, was very fully discussed in the case of *Pilkington v. Commissioners for Claims on France* (2 Knapp, P. C. C. 7); there the French Government having, during war with England by decree confiscated the debts due by French to English subjects, the decree of confiscation was afterwards repealed. After the repeal of the decree of confiscation, a French subject paid into the treasury of the French Government, in the name of his creditor, the amount of a debt due to an English subject, in the currency of the time, which however was much depreciated since the declaration of his debt under the decree of confiscation. France having entered into a treaty to make compensation for all undue confiscations and sequestrations, it was held by the Privy Council, on appeal from the award of the commissioners for liquidating claims of British subjects and others against the Government of

France, that the debt ought to be calculated according to the value in currency at the time of the debtor's declaration. "Great part of the argument at the bar," said Sir *William Grant*, M. R., in his elaborate judgment, "would undoubtedly go to show that the commissioners have acted wrong in throwing that loss upon the French Government in any case; for they resemble it to the case of depreciation of currency happening between the time that a debt is contracted and the time that it is paid; and they have quoted authorities for the purpose of showing that in such a case the loss must be borne by the creditor, and not by the debtor. That point it is unnecessary for the present purpose to consider, though Vinnius (Ad Instit. lib. 3, tit. 15, no. 12), whose authority was quoted the other day, certainly comes to a conclusion directly at variance with the decision in Sir John Davys' Reports, p. 26 (*Le Case de mixt moneys*); he takes the distinction, that if between the time of contracting the debt and the time of its payment the currency of the country is depreciated by the State, that is to say, lowered in its intrinsic goodness, as if there were a greater proportion of alloy put into a guinea or a shilling, the debtor should not liberate himself by paying the nominal amount of his debt in the debased money; that is, he may pay in the debased money being the current coin, but he must pay so much more as would make it equal to the sum he borrowed; but

he says, if the nominal value of the currency, leaving it unadulterated, were to be increased, as if he were to make the guinea pass for 30s., the debtor may liberate himself from a debt of £1. 10s., by paying a guinea, although he had borrowed the guinea when it was but worth 21s. I have said it is unnecessary to consider whether the conclusion drawn by Vinnius, or the decision in Davys' Reports, be the correct one; for this has no analogy to the case of creditor and debtor. There is a wrong act done by the French Government; then they are to undo that wrong act, and to put the party into the same situation as if they never had done it. It is assumed to be a wrong act, not only in the treaty, but in the repealing decree; they justify it only with reference to that which, as to this country, has a false foundation, namely, on the ground of what other Governments had done towards them; they having confiscated the property of French subjects, therefore, they say, we thought ourselves justified at the time in retaliating upon the subjects of this country. That being destitute of foundation as to this country; the republic themselves, in effect, confess that no such decree ought to have been made, as it affected the subjects of this country; therefore it is not merely the case of a debtor paying a debt at the day it falls due, but it is the case of a wrong-doer, who must undo, and completely undo, the wrongful act he has done; and if he has received the assignats at

the value of 50d. he does not make compensation by returning an assignat which is only worth 20d.; he must make up the difference between the value of the assignats at different periods. And that is the case stated by Sir John Davys, (p.27), where *restitutio in integrum* is stated. He says two cases were put by the Judges who were called to the assistance of the Privy Council, although they were not positively and formally resolved; he says, it is said if a man upon marriage receives £1000 as a portion with his wife, paid in silver money, and the marriage is dissolved *causâ præcontractâ*, so that the portion is to be restored, it must be restored in equal good silver money, though the state shall have depreciated the currency in the mean time. So, if a man recovers £100 damages, and he levies that in good silver money, and that judgment is afterwards reversed, by which the party is put to restore back all he has received, the judgment-creditor cannot liberate himself by merely restoring £100 in the debased currency of the time, but he must give the very same currency that he had received. That proceeds upon the principle, that if the act is to be undone, it must be completely undone, and the party is to be restored to the situation in which he was at the time the act to be undone took place. Upon that principle, therefore, undoubtedly the French Government, by restoring assignats at the end of thirteen months, did not put the party in the same situation in which he was when they

took from him assignats that were of a very different value.

We have said, that as this point is not directly or immediately before us, it can make no part of our decree. At the same time, it may not perhaps have been without some utility to have given an opinion upon it, inasmuch as it was argued and discussed at the bar; and we think, therefore, the commissioners have proceeded on a perfectly right principle in those cases in which we understand they have made an allowance for the depreciation of paper money; and considering that this case does not differ from those in which they have made that allowance, we are of opinion that the claimants ought to have the same equity administered to them in remunerating them for the loss they have sustained."

5. Discharge or Dissolution of a Contract,—by what Law governed.

—As a general rule, a discharge good by the law of the country where a contract was entered into is good everywhere. Thus, in *Potter v. Brown*, 5 East, 124, the defendant gave to the plaintiffs in America, where they were all resident, a bill of exchange drawn upon a person in England. The bill was protested in England for non-acceptance, and the defendant afterwards, while still resident in America, became bankrupt there, and obtained a certificate of discharge by the laws of that country. It was held by the Court of King's Bench that such certificate was a bar to an ac-

tion in England upon an implied *assumpsit* to pay the amount of the bill in consequence of such non-acceptance in England. "The rule," said Lord *Ellenborough*, C. J., "was well laid down by Lord *Mansfield* in *Ballantine v. Golding* (Cooke's Bankrupt Law, 347, 1st ed.) that *what is a discharge of a debt in the country where it was contracted, is a discharge of it everywhere*. And that principle was recognized in *Hunter v. Potts* (4 T. R. 182). Now this debt arose out of a contract in America. The debt was incurred there for which the bill was given. The bill was drawn in America upon a person in England; but not having been accepted, the parties stood on their original rights, upon a contract made in America, for which security was there agreed to be taken, upon the faith indeed that it would be accepted and paid in England; but of which there has been no performance. No English act has been done to alter the situation of the parties; even the notice of the non-performance, which is one of the circumstances on which the implied *assumpsit* is founded, must have been given in America, where the parties are stated to have resided when the bill was given and when the bankruptcy happened, and nothing appearing to show that they ever changed their residence. Then if the bankruptcy and certificate would have been a discharge of the debt in America, which it clearly would, it must by the comity of the law of nations be recognized in the cases I have mention-

ed, be the same here. It is in every day's experience to recognize the laws of foreign countries as binding on personal property ; as in the sale of ships condemned as prize by the sentences of foreign courts ; the succession to personal property by will or intestacy of the subjects of foreign countries. We always import together with their persons the existing relations of foreigners as between themselves, according to the laws of their respective countries ; except indeed where those laws clash with the rights of our own subjects here, and one or other of the laws must necessarily give way, in which case our own is entitled to the preference. This having been long settled in principle, and laid up amongst our acknowledged rules of jurisprudence, it is needless to discuss it any further." See also *Quelin v. Moisson*, 1 Knapp, 266 n. ; *Quin v. Keefe*, 2 H. Black. 553.

It must however be remembered that where the effect in a foreign country of bankruptcy, insolvency, or a *cessio bonorum*, is a mere discharge of the person of the debtor and not of his property, they cannot be pleaded in defence to proceedings in this country. *Ex parte Burton*, 1 Atk. 255 ; *Phillips v. Allan*, 8 B. & C. 477 ; Stor. Conf. of Laws, § 339.

A discharge moreover of a contract by the law of a place where the contract was not made or performed, will not be a discharge of it in any other country. Thus it was held in this country that an order for a discharge from

debt generally under an Act in Maryland for the relief of insolvent debtors, was no bar to a suit for a debt contracted in England. "It is impossible," said Lord *Kenyon*, C. J., "to say that a contract made in one country is to be governed by the laws of another. It might as well be contended that if the State of Maryland had enacted that no debts due from its own subjects to the subjects of England should be paid, the plaintiff would have been bound by it. This is the case of a contract lawfully made by a subject in *this country*, which he resorts to a court of justice to enforce ; and the only answer given is, that a law has been made in a foreign country to discharge these defendants from their debts on condition of their having relinquished all their property to their creditors. But how is that an answer to a subject of this country suing on a lawful contract made here ? how can it be pretended that he is bound by a condition to which he has given no assent, either express or implied ? . . . The case of *Ballantine v. Golding* (Cooke's Bankrupt Law, 347, 1st ed.) is very distinguishable from the present ; for there the debt was contracted in Ireland where the commission issued. But in the same page of the book from whence that was quoted is to be found an opinion of Lord *Talbot's* directly contrary to the conclusion we are desired to draw in this case ; for there he held that though the commission of bankrupt issued here attached on the bankrupt's

effects in the plantations, yet his certificate would not protect him from being sued *there* for a debt arising *therein*." *Smith v. Buchanan*, 1 East, 6; see also *Lewis v. Owen*, 4 B. & Ald. 654; *Phillips v. Allan*, 8 B. & Cres. 477; *Rose v. M'Leod*, 4 Shaw & Dunl. 311; overruling *Royal Bank of Scotland v. Cuthbert*, 1 Rose, 486.

However upon the construction of a particular statute (54 Geo. III. c. 137) it was held that a debt contracted in England by a trader residing in Scotland was barred by a discharge under a sequestration in Scotland. *Sidaway v. Hay*, 3 B. & Cress. 12. This however does not at all trench upon the authority of *Smith v. Buchanan* and that class of cases, because they depend upon the principle that the legislature of another country could not bind the subjects of this country, whereas *Sidaway v. Hay* was decided upon the ground that the statute then in question was binding both in Scotland and in England.

Upon the same principle apparently it was held in *Edwards v. Ronald*, 1 Knapp, 259, that a certificate of conformity obtained under a commission of bankruptcy in England, was a bar to an action for a debt contracted by the bankrupt at Calcutta previously to his bankruptcy, although the creditor had no notice of the commission, and was resident at Calcutta. See and consider *Le Feuvre v. Sullivan*, 10 Moore, P. C. C. 1, 13.

A discharge however in a foreign country, contrary to international

laws and usages, will not be recognized. *Wolff v. Oxholme*, 6 M. & S. 92.

Although, as a general rule, a contract as to its dissolution and discharge will be governed by the *lex loci contractus*, it by no means necessarily follows that a contract can only be discharged or dissolved by the same law under which the parties entered into it. "If," says Lord *Brougham* in a celebrated case, "a contract for sale of a chattel is made, or an obligation of debt is incurred, or a chattel is pledged in one country, the sale may be annulled, the debt released, and the pledge redeemed by the law and by the forms of another country in which the parties happen to reside and in whose Courts their rights and obligations come in question, unless there was an express stipulation in the contract itself against such avoidance, release, or redemption. But at any rate this is certain, that if the laws of one country and its Courts recognize and give effect to those of another in respect of the constitution of any contract, they must give the like recognition and effect to those same foreign laws when they declare the same kind of contract dissolved. Suppose a party forbidden to purchase from another by our equity, as administered in the Courts of this country (and we have some restraints upon certain parties, which come very near prohibition), and suppose a sale of chattels by one to another party standing in this relation towards each other should be effected in

Scotland, and that our Courts here should (whether right or wrong) recognize such a rule because the Scotch law would affirm it,—surely it would follow that our Courts must equally recognize a rescission of the contract of sale in Scotland by any act which the Scotch law regards as valid to rescind it, although our own law may not regard it as sufficient. Suppose a question to arise in the Courts of England respecting the execution of a contract thus made in this country, and that the objection of its invalidity were waved for some reason; if the party resisting its execution were to produce either a sentence of a Scotch Court declaring it rescinded by a Scotch matter done in *pais*, or were merely to produce evidence of the thing so done and proof of its amounting by the Scotch law to a rescission of the contract, I apprehend that the party relying on the contract could never be heard to say, ‘The contract is English, and the Scotch proceeding is impotent to dissolve it.’ The reply would be, ‘Our English Courts have (whether right or wrong) recognized the validity of a Scotch proceeding to complete the obligation, and can no longer deny the validity of a similar but reverse proceeding to dissolve it—*unumquodque dissolvitur eodem modo quo colligatur*.’ Suppose, for another example (which is the case), that the law of this country precluded an infant or married woman from borrowing money in any way, or from binding themselves by deed, and that in another

country these obligations could be validly incurred, it is probable that our law and our Courts would recognize the validity of such foreign obligations. But suppose a feme covert had executed a power, and conveyed an interest under it to another feme covert in England, could it be endured that where the donee of the power produced a release under seal from the feme covert in the same foreign country, a distinction should be taken, and the Court here should hold that party incapable of releasing the obligation? Would it not be said that our Courts, having decided the contract of a feme covert to be binding when executed abroad, must by parity of reasoning hold the discharge or release of the feme covert to be valid, if it be valid in the same foreign country?” *Warrender v. Warrender*, 9 Bligh, 125. As will hereafter be more fully shown, the extinction of an obligation by prescription or the statute of limitations, being a matter of procedure, depends upon the *lex fori*.

The defence of infancy depends on the *lex loci contractus*, and if it be good there, it will be good in every other place. *Male v. Roberts*, 3 Esp. 163.

6. *What Law regulates the Enforcement of Contracts.*—Without going into the question as to the jurisdiction over or proceedings taken with respect to immovable property, which are as a general rule regulated by the *lex loci rei sitæ*, nor into the question as to how far such property may be effected by pro-

ceedings *in personam*, as to which see Story, Conf. Law, § 530, § 555; *Penn v. Lord Baltimore*, 2 Tud. L. Cas. Eq. 767, and note; we may here notice the distinction laid down and acted upon by Lord *Brougham* in the principal case, viz. that although as a general rule the merits or validity of a contract depend upon the law of the country where it is entered into, "yet that whatever relates to the *remedy* to be enforced must be determined by the *lex fori*—the law of the country to the tribunals of which the appeal is made."

A difficulty indeed, as in the principal case, often arises in drawing the distinction between what relates to the *merits or validity* of a contract and what relates merely to the *remedy* to be enforced. It is proposed to give a few examples where the *lex fori* has been considered applicable.

First, in the commencement of a suit, it seems to be clear that the name of the party in which it is brought belongs not so much to the right and merit of the claim, as to the form of the remedy. For instance, as a debt being a mere chose in action is not assignable at law in this country and the assignee must consequently commence an action in the name of the assignor, it has been held that, even where an assignment has taken place of a debt contracted in a foreign country by the laws of which it is legally assignable, the assignee cannot in this country commence an action in his own name. *Wolff v. Oxholm*, 6 Mau. & Selw. 92,

99. Upon the same principle it was held that a trustee under the Scotch Bankrupt Act (54 Geo. III. c. 187) could not sue in England for a chose in action,—a balance of an account due to the estate of the bankrupt. *Jeffery v. M'Taggart*, 6 Mau. & Selw. 126.

But it certainly has been held that where a debt is by the *lex loci contractus* in its origin legally assignable, so as to pass the title to the thing assigned to the assignee, he may commence proceedings in his own name in this country. We may instance the case of the assignee of an Irish judgment (*O'Callaghan v. Thomond*, 3 Taunt. 82), and of a Scotch bond (*Innes v. Dunlop*, 8 T. R. 595). See also *Alivon v. Furnival*, 1 Crompt. Mees. & Rosc. 277, 296; *Stephens v. M'Farland*, 8 Ir. Eq. Rep. 444.

The arrest of a person under proceedings in this country depends upon the *lex fori*, and it may take place, although it would not be allowed in the country where the debt was contracted. Thus in *De la Vega v. Vianna*, 1 B. & Ad. 284, it was held that one foreigner might arrest another in England for a debt which accrued due in Portugal while both resided there, *although the Portuguese law did not allow of arrest for debt*. "In *Molan v. The Duke de Fitzjames*," said Lord *Tenterden*, C. J. (1 B. & P. 188), "the distinction taken by Mr. Justice *Heath*, who differed from the other judges, was that in construing contracts the law of the country in which they are made must govern, but that the remedy upon

them must be pursued by such means as the law points out where the parties reside. This doctrine is said to correspond with the opinions of Huber (Hub. Prælect. de Conflictu Legum, pars ii. lib. 1, tit. (3, sect. 7) and Voet (Comm. ad Pand. lib. 1, tit. 8, s. 30, and lib. 44, tit. 3, s. 12). I have not had an opportunity of looking into those authorities, but we think, on consideration of the present case, that the distinction laid down by Mr. Justice Heath ought to prevail. A person suing in this country must take the law as he finds it; he cannot, by virtue of any regulation in his own country, enjoy greater advantages than other suitors here, and he ought not therefore to be deprived of any superior advantage which the law of this country may confer. He is to have the same rights which all the subjects of this kingdom are entitled to." See also *Imlay v. Ellefsen*, 2 East, 453; *Brettillot v. Sandoz*, 4 Scott, 201. The cases of *Melan v. Duke de Fitzjames*, 1 Bos. & Pull. 138; *Talleyrand v. Boulanger*, 3 Ves. 447; and *Flack v. Holm*, 1 J. & W. 405, 417, as to the point in question may be considered as overruled.

Upon the same principle it has been held, that proceedings in this country by the master of a foreign vessel against the freight for his wages belong to the remedy, and must therefore be governed by the *lex fori*. See '*The Milford*,' 6 W. R. 554 (Adm.): there the plaintiff had sailed in a ship belonging to the United States, as second mate, to England. During the voyage,

by the death of the original master and of the first mate, the command of the ship devolved upon him. It was held by Dr. Lushington that the plaintiff was entitled to recover his wages by an action against the freight under 191st section of the Merchant Shipping Act. "This being," said the learned Judge, "an American ship, the contract must be taken to have been an American contract; and had any question therefore arisen as to the meaning and true interpretation of the contract, I should undoubtedly have been governed by the law of the United States. I think no such question arises on the present occasion. The learned counsel who argued first for the owners, very candidly admitted that the law was to be taken as completely settled by the case of *Don v. Lippmann* (5 C. & F. 1). It was said in that case, 'whatever relates to the remedy to be enforced must be determined by the *lex fori*—the law of the country to the tribunals of which the appeal is made.' It seems impossible, therefore, for any one to come to any other conclusion than this, that to arrest the freight was the remedy by which a master was to recover his wages, and consequently that is the law by which such cases must be governed."

The admission of evidence and the weight to be attributed to it depend on the law of the country where the action is brought, and not on the *lex loci contractus*. It is upon this principle that an action will not lie in the

Courts of this country to enforce an oral agreement made in France (and valid there), which if made here could, not by reason of the Statute of Frauds, have been sued upon, inasmuch as that statute applies not to the *validity* of the contract, but only to *procedure*. See *Leroux v. Brown*, 12 C. B. 801: there the declaration stated that the plaintiff had agreed to enter into the defendant's service as clerk and agent *for one year certain* at certain wages, and evidence was given on the part of the plaintiff to show, that by the law of France such an agreement was capable of being enforced, although not in writing. It was held that the 4th section of the Statute of Frauds, which relates solely to the *remedy* upon, and not to *validity* of, the contract, was applicable, and consequently that the contract could not be enforced here. "There is no dispute," said *Jervis*, C. J., "as to the principles which ought to govern our decision. My brother Allen admits that if the 4th section of the Statute of Frauds applies, not to the *validity* of the contract, but only to *procedure*, the plaintiff cannot maintain this action, because there is no agreement nor any memorandum or note thereof in writing. On the other hand, it is not denied by Mr. Honeyman—who has argued the case in a manner for which the Court is much indebted to him—that if the 4th section applies to the contract itself, or, as Boullenois expresses it, to the *solemnities* of the contract, inasmuch as our law cannot regu-

late foreign contracts, a contract like this may be enforced here. I am of opinion that the 4th section applies not to the solemnities of the contract, but to the procedure; and therefore that the contract in question cannot be sued upon here. The contract may be capable of being enforced in the country where it was made, but not in England." . . . After quoting the words of the 4th section, his Lordship continues, "The statute in this part of it, does not say that unless certain requisites are complied with, the *contract shall be void*, but merely, that *no action shall be brought upon it*, and as was put with great force by Mr. Honeyman, the alternative, 'unless the agreement or some memorandum or note thereof shall be in writing,'—words which are satisfied if there be any written evidence of a previous agreement,—shows that the statute contemplated that the agreement *may be good*, though not *capable of being enforced*, if evidenced by writing. This therefore may be a very good agreement, though for want of a compliance with the requisites of the statute, not enforceable in an English court of justice." After referring to *Carrington v. Roots* (2 M. & W. 248), *Reade v. Lamb* (6 Exch. 130), *Crosby v. Wadsworth* (6 East, 602), and *Laythorp v. Bryant* (2 N. C. 735, 3 Scott, 238), his Lordship concludes thus, "I therefore think we are correct in holding that the contract in this case is incapable of being enforced by an action in this country, because the 4th section of

29 Car. II. c. 3, relates only to the *procedure*, and not to the *right* and *validity* of the contract itself. As to what is said by Boullenois in the passage last cited by Brother Allen (Boullenois, *Traité des Statuts réels et personnels*, tom. 2, tit. iv. ch. 2, observ. 46, p. 459), it is to be observed that the learned author is there speaking of what pertains *ad vinculum obligationis et solemnitatem*, and not with reference to the mode of procedure." See also *Yates v. Thomson*, 3 C. & F. 544; *Bain v. Whitehaven, etc., Railway Company*, 3 H. L. Cas. 1.

Set-off or compensation will be treated as part of the remedy, and will therefore be admissible in claims between persons belonging to different states or countries, although it may not be admissible by the law of the country where the debt which is sued for was contracted. *Stor. Confl. Laws*, § 575.

Liens also and implied hypothecations, and priorities of satisfaction given to creditors by the law of particular countries, and the order of payment of their debts, are generally treated as belonging to proceedings in suits, *ad litis ordinationem*, and not to the merits of the claim. *Ib.*

The limitation of actions clearly does not belong to, and will not be determined by, the law of the country where the contract was entered into, but by the law of the country where proceedings are taken to enforce it. Thus in the principal case, where proceedings were taken in Scotland upon bills of exchange drawn in France, it

was held by the House of Lords that the Scotch law of prescription was applicable, and that its effect was not prevented by the fact that the payee had taken legal proceedings in France during the absence of the debtor, and had obtained judgment against him. Upon the same principle it was held in *Huber v. Steiner* (2 Bing. N. C. 202; 2 Scott, 804), that the payee of promissory notes made in France might sue the maker then resident in England, although the action was barred by the law of France, inasmuch as the time allowed by the English Statute of Limitations had not elapsed. "We take it," said *Tindal*, C. J., "to be clearly established, and recognized as part of the law of England, by various decisions, that if the prescription of the French law, which has been opposed to the plaintiff in the present case, is no more than a limitation of the time within which the action upon the note must be brought in the French Courts, it will not form a bar to the right of action in our English Courts; but that the question, whether the action is brought within due and proper time, must be governed by the English statute. The distinction between that part of the law of the foreign country where a personal contract is made, which *is* adopted, and that which *is not* adopted by our English Courts of law, is well known and established; namely, that so much of the law as affects the rights and merit of the contract, all that relates '*ad litis decisionem*' is adopted from the foreign country;

so much of the law as affects the remedy only, all that relates '*ad litis ordinationem*' is taken from the '*lex fori*' of that country where the action is brought; and that in the interpretation of this rule, the time of limitation of the action falls within the latter division, and is governed by the law of the country where the action is brought, and not by the *lex loci contractûs*, is evident from many authorities. In Huber's treatise, *De Conflictu Legum*, § 7, he says, '*Ratio hæc est, quod præscriptio (where observe, the term *præscriptio* is used generally for limitation) et executio non pertinent ad valorem contractûs, sed ad tempus et modum actionis instituendæ.*'" See also *Campbell v. Steiner*, 6 Dow, 116, 184; *Fergusson v. Fyffe*, 8 C. & F. 140; *The British Linen Company v. Drummond*, 10 B. & Cress. 903; *De la Vega v. Vianna*, 1 Barn. & Ad. 284.

It was argued in the principal case that the *lex fori* was not applicable to these cases, inasmuch as prescription is of the very nature of the contract, and that the party contracting is bound for a given time, and a given time only, that is, according to the prescription of the place where the contract was entered into. Lord Brougham however very satisfactorily disposed of this argument. "One party," he observed, "does not bind himself for a particular period at all, but merely to do something on a certain day, or on one or other of certain days. In the case at the bar the obligation is to pay a sum cer-

tain at a certain day, but the law does not suppose that he is at the moment of making the contract contemplating the period at which he may be freed by lapse of time from performing it. The argument that the limitation is in the nature of the contract, supposes that the parties look only to the breach of the agreement. Nothing is more contrary to good faith than such a supposition. If the law of the country proceeds on the supposition that the contracting parties look only to the period at which the Statute of Limitation will begin to run, it will sanction a wrong course of conduct, and will turn a protection against laches into a premium for evasiveness." *Ante*, p. 223.

A distinction characterized by Lord Brougham in the principal case as "excellent" (*ante*, p. 223), and approved of by Tindal, C. J., in *Huber v. Steiner*, 2 Bing. N. C. 211, has been taken by Mr. Justice Story as follows, "Suppose the statutes of limitation or prescription of a particular country do not only extinguish the right of action, but the claim or title itself *ipso facto*, and declare it a nullity after the lapse of the prescribed period, and *the parties are resident within the jurisdiction during the whole of that period*, so that it has actually and fully operated upon the case; under such circumstances the question might properly arise, whether such statutes of limitation or prescription may not afterwards be set up in any other country to which the parties may remove, by

way of extinguishment, or transfer of the claim or title." Stor. Confl. of Laws, § 582. This point however has not yet been actually decided, nor was it raised in the recent case of *Her Highness Ruckmaboye v. Mottichund*, 8 Moore, P. C. C. 4; 5 Moore, Ind. App. Cas. 234.

As to the question how far foreign judgments (in which terms the judgments of the Courts in our own colonies are included) are binding and can be enforced in this country, see 2 Smith's Leading Cases, p. 632, 4th ed., and Westlake, Priv. Internat. Law, p. 361.

Foreign law must be proved in this country as a matter of fact by appropriate evidence, that is, by properly qualified witnesses who can state from their own knowledge, gained by study and practice, not only what are the words in which the law is expressed, but also what is the interpretation of

those words and the legal meaning and effect of them as applied to the case in question (see *Earl Nelson v. Lord Bridport*, 8 Beav. 527; *Smith v. Gould*, 4 Moo. P. C. C. 21), and foreign law must be pleaded as a fact, and not merely in an argumentative and inferential manner. *Benham v. The Earl of Mornington*, 3 C. B. 133; 4 Dowl. & L. 213; *M'Leod v. Schultze*, 1 Dow. & L. 614. A question of foreign law being one of fact must be proved in each case, the evidence adduced in another cause, although upon the same point, being clearly insufficient. *M'Cormick v. Garnett*, 5 De G. Mac. & G. 278.

Until the foreign law is proved there is a presumption that it is the same as that of England. *Smith v. Gould*, 4 Moo. P. C. C. 21.

For further information on the subject of this note, the reader is referred to Mr. Westlake's able and recent treatise on Private International Law.

SANDILANDS AND OTHERS, EXECUTORS OF
HOWDEN, *v.* MARSH.

K.B. Trin. Term, 59 Geo. III. 1819.

[REPORTED 2 BARN. & ALD. 673.]

PARTNERSHIP—POWER OF PARTNER TO BIND THE FIRM.]

The act and assurance of one partner, made with reference to business transacted by the firm, will bind all the partners.

In a matter wholly unconnected with the partnership, one partner cannot bind the other.

Where, however, one of two partners makes a contract as to the terms on which any business is to be transacted by the firm, although such business is not in their usual course of dealing, and even contrary to their arrangement with each other, and the business is afterwards transacted by or with the knowledge of the other partner, the latter will be bound by the contract so made.

Assumpsit. The declaration stated that I. Howden, deceased, employed the defendant as his agent to lay out £4000 in the purchase of an annuity, and to receive the arrears thereof, and that in consideration thereof, and of a certain commission, defendant promised to guarantee the payment of the annuity, and alleged a breach in not having so guaranteed. Plea, general issue. At the trial before *Abbott, C. J.*, at the adjourned sittings at Guildhall, after last Michaelmas Term, it appeared that the defendant, who was a navy agent, had formerly been in partnership with a Mr. Creed, and that a firm of Marsh and Creed had been the navy agents to Mr. Howden. On the 12th of September, 1811, Mr. Creed wrote the following letter to Mr. Howden:—"I have an opportunity of employing your remaining property in the stocks for three or four years in a way that will double, or nearly so, the income that you derive from that source. It is by annuity of eight

per cent. per annum, on three lives, secured on property, the receipts of which pass through our hands, and will be guaranteed by our house, and not redeemable until after three years. The party granting the annuity is in the receipt of a clear unincumbered income of above £12,000 per annum, and will, as soon as he can after the lapse of three years, redeem the annuity, so that your capital remains untouched. For our trouble in the business, and for guaranteeing the punctual half-yearly payment of the annuity to you, we should expect a commission of five per cent., but the benefit you would derive from the arrangement would very well allow of it. Windsor's and this annuity would soon clear off the advance on our account, and leave your income materially improved. If you see this business in the light I do, and will say aye or no by return of post, I will either go on with it and send you down a bank power for sale of your stock, or else secure it for some other friend." This letter was signed Richard Creed. Howden immediately accepted this offer, and a joint power of attorney was transmitted, empowering Marsh and Creed to sell the stock; and the stock was accordingly sold out on the 7th of January, 1812. On the 23rd of January, 1813, the annuity in question was purchased of Mr. Joshua Rowe, and after having been paid for about two years, became in arrear. Howden died 7th March, 1813. By a letter, dated 10th April, 1813, signed Marsh and Creed, in answer to an application made on the part of Mr. Howden's representatives, they stated in substance as follows:—"He has two annuities, one yielding a clear £400 per annum, payable quarterly, exclusive of the amount of the annual premium on the insurance on the life of Mr. Rowe, the grantor, at the Equitable Insurance Office, and the purchase-money for which was £4000 in place of £5000, which we informed Mr. Howden we should give for it. This is guaranteed by our house on a commission, and is not determinable for three years." Neither of the above letters were entered in Marsh and Creed's letter-book, nor did it appear that Marsh had personally any knowledge of the guarantee.

It was proved, that *it was no part of the ordinary business of navy agents to deal in annuities.* The charge of £5 per cent. commission had never been made, but only 2½ per cent., the usual commission of navy agents, had been charged in the different accounts transmitted by Marsh and Creed. In those accounts, however, there were found several items, referring to the sale of the stock and the receipt of the annuity. Under these circumstances

it was contended, first, that this guarantee by Creed could not bind his partner, Marsh; and secondly, that if it could it was a security which ought to have been enrolled under the provisions of the Annuity Act (17 Geo. III. c. 26). The learned Judge overruled these objections, and left it to the jury to say whether, under the circumstances of the case, Marsh was cognizant of the transaction as to the purchase of the annuity, although he might be ignorant of the facts of the guarantee itself, telling them that in that case he thought the defendant was liable. The jury found this fact in the affirmative, and the plaintiffs obtained a verdict. The defendant had liberty to move to enter a nonsuit on both points; and a rule nisi to that effect having been obtained by Marryat in last Hilary Term—

Scarlett and Adams now showed cause. They contended, that the case had been properly left to the jury to say whether Marsh was or was not cognizant of the transaction; and the jury had found that he was. If so, he must be bound by the representations and acts of his partner in it. As to the second point, the distinction is, that only those securities which come from the grantee or his sureties are required to be registered; but this guarantee was wholly independent of and, for anything that appears, unknown to the grantor. He was not in any degree responsible over either to Marsh or Creed, in case they were called upon by Howden to pay the annuity. Then it did not require to be memorialized, because the only object of the Act was for the further protection of the grantor, to record all the securities coming directly or indirectly from him.

Marryat and Wilde contra.—One partner has no power to bind another by a guarantee of this sort. It was not an act done in the ordinary course of business, and its operation might last beyond the duration of the partnership, or even the life of the parties. There was no pretence for saying that Marsh was cognizant of the circumstances of the guarantee itself. The letters containing it were never entered in the letter-book of the firm; and the mere receipt of the 2½ per cent. on the money, which was the consideration for the annuity, is not sufficient of itself to charge him with the guarantee. The £5 per cent., which was the consideration for it, never was received at all. All Marsh's acts are perfectly consistent with the ordinary course of dealing, and no more. The case of *Duncan v. Lowndes* (3 Campb. 478) is precisely in point. But supposing it to be a guarantee binding on Marsh, still the plaintiff

cannot recover, not having complied with the Annuity Act (17 Geo. III. c. 26). It would defeat all the provisions of that Act, if this did not require to be memorialized; a person meaning to grant an annuity, would then only have to guarantee an annuity granted by a pauper in order to evade the Act. The case of *Rosher v. Hurdiss* (5 T. R. 678) shows however that is not the law. But there is another objection. The guarantee, at all events, depends upon the second letter alone, for there is nothing to connect the first and second letters together. The price is different, and they relate to different annuities. If so, then inasmuch as the second letter only states that a guarantee has been given, but omits the terms of the guarantee, it is not sufficient to take the case out of the Statute of Frauds. [Abbott, C. J.—Can it be contended, if a person writes a letter, offering to purchase an annuity and to guarantee its payment, and requesting a power to sell out stock to be sent for that purpose, that he will not, after his proposal has been acceded to, and the stock has been sold out, be liable to make good his guarantee, because exactly the same annuity as that proposed has not been bought?] The question is not whether he would not be bound to make compensation, but whether he would be liable on the guarantee. The second letter admits that a guarantee was given, but is wholly silent as to its terms. *Wain v. Warlters*, 5 East, 10.

Abbott, C.J.—This case has been very fully and ably discussed at the bar; but I am of opinion that the rule must be discharged.

Two material questions have been made; the first of which, and the most important and extensive in its consequences, is whether this defendant shall be held to be bound by the guarantee given without his knowledge by his partner Creed; and if the verdict of the jury, finding him to be so bound, be not sustainable, it will be very dangerous hereafter to deal with a partnership; for the business in each department of a firm is generally transacted by one partner only. It has undoubtedly been held, that in a matter wholly unconnected with the partnership, one partner cannot bind the others. But the true construction of the rule is this, that *the act and assurance of one partner, made with reference to business transacted by the firm, will bind all the partners*.

In this case, the proper business of Marsh and Creed was to receive the money due from the Navy Board to their customers, and their dividends in the public funds; upon which business they charged Howden with a commission of $2\frac{1}{2}$ per cent. It was no part of their ordinary business to guarantee annuities, or to lay out the money

of their customers in the purchase of them. Under these circumstances, the original proposal was made by Creed, in answer to which the joint power of attorney was transmitted to Marsh and Creed, under which the stock was afterwards sold. Now that sale must have appeared in the partnership books; and if that fact was doubtful, it is proved by the balance stated in the accounts transmitted by the partnership: that sale, therefore, and the fact that the proceeds had been laid out in the purchase of an annuity, either were actually known or ought to have been known by Marsh. Now, if that whole transaction was known to him, the guarantee which is connected with it becomes, in point of law, an assurance made by one partner with reference to business transacted by both; and, according to the rule previously stated, it will bind both.

To illustrate this position, a case may be put, where two persons in partnership for the sale of horses, should agree between themselves never to warrant any horse; yet, though this be their course of business, there is no doubt, that if upon the sale of a horse, the property of the partnership, one of them gives a warranty, the other would be thereby bound.

As to the second question, whether this guarantee ought to have been enrolled according to the provisions of the Annuity Act, I agree that that statute ought not to receive a narrow construction, so far as the interest of the grantor of the annuity is concerned. Every security, therefore, given by him or on his behalf, and for which the money received by him is the consideration, must be enrolled. But the consideration for this promise is wholly distinct from that given for the annuity. It is the payment of an additional commission of $2\frac{1}{2}$ per cent.; whereas the consideration for the annuity is the sum of £4000. It is wholly unconnected with the grantor, and collateral to his interest, and does not, I think, require to be enrolled. I am therefore of opinion, on both grounds, that this rule should be discharged.

Bayley, J.—I have entertained considerable doubts during the discussion of this case, but I am now entirely satisfied on both points. It is true that one partner cannot bind another out of the regular course of dealing by the firm. But where the assurance has reference to business transacted by the partnership, although out of the regular course, it is still within the scope of his authority, and will bind the firm. Now if we apply that rule to this case, we find a proposal by Creed, concerning business to be transacted by the house. If so, it must have been transacted on the terms

stated in the letter of Creed; and if Marsh and Creed were thus agents in laying out Howden's money in the annuity, they must be bound by the terms specified by Creed. For this is a representation made by one partner as to the terms upon which the business is to be done by the firm. This is made still more clear by the letter of the 10th April, 1813.

It is suggested, indeed, that this may have reference to some other guarantee than that of the letter of 12th September, 1811. But if so, it was for the defendant to have proved that fact. Then it is contended, that the second letter by the firm does not specify the amount of the commission, and that this case falls within *Wain v. Warlters*. But that difficulty is removed, by connecting it with the former letter, in which the terms are specified. The stamp acts proceed on the same principle, that an agreement may be inferred from several letters; and therefore direct that the stamping of one shall be sufficient.

The other question is, whether this guarantee ought to have been enrolled. The case of *Rosher v. Hurdiss* does not in terms show whether the security there was not given at the instance of the grantor. And there is a material difference between sureties for a grantor who are identified with him, and other persons wholly unconnected with him. If, in this case, Rowe had been told that Marsh and Creed were to be his guarantees, and he had given them any consideration for so doing, the case would be different. But here these parties guarantee, not at the instance of the grantor, but of the grantee. I am of opinion that this is not within either the terms or the spirit of the Annuity Act.

Holroyd, J.—I am of the same opinion. It was properly left to the jury to say whether Marsh was cognizant of the contract to lay out this money in the purchase of an annuity; and then whatever engagement Creed might make with reference to it would bind Marsh; for by his knowledge of it being found by the jury, it becomes for this purpose part of the partnership business, as much as any transaction in the ordinary course of dealing. The first letter seems to me to be applicable to any annuity to be purchased with the money to be raised by sale of the funded property; and that the parties themselves so considered it, appears from the second letter. We have, therefore, a right to connect these two letters together, and by so doing, the objection that the terms of the guarantee are not specified in the second letter is removed. The great difficulty in my mind is as to the enrolment, and it

arises from this guarantee having been originally mentioned as one of the terms upon which the grantee was to advance his money. It does not however appear that the grantor had any knowledge of it, and that makes a material difference. For there being nothing in the letter which imports that the terms of the proposal come from the grantor, it may be considered as wholly collateral to the transaction, and as no part of the condition on which the annuity was granted by him. The words of the Act are, "That a memorial of every deed, etc., *whereby any annuity shall be granted*, shall be enrolled:" and the warrants of attorney, of which the Act subsequently speaks, are those given by the grantor. I think, therefore, that the assurances meant in this clause are those connected with the grantor; and that as this guarantee was wholly unconnected with him, it did not require to be enrolled.

Best, J.—I am clearly of the same opinion on both points. If we were to decide the first point in favour of the defendant, we should place persons who have occasion to deal with partnerships in a new and difficult situation; for, unless they made inquiry from every one of the partners whether they assented to the partnership transaction, which in many cases would be impossible, they would have the security of the individual only, and not that of the firm. In this case it appears that Marsh and Creed acted not merely as navy agents, but also in the procuring of this annuity, and that they have received an advantage from the transaction. For, although it is said they did not receive the 5 per cent. commission, yet at all events they were benefited by receiving $2\frac{1}{2}$ per cent. commission on a larger sum arising from this annuity. Marsh, therefore, who has derived an advantage from the engagement entered into by his partner, must be bound by the consequences of it. This question, therefore, was properly left to the jury, who have in my opinion found the right verdict.

As to the second point, it seems to me that the object of the Annuity Act was to protect inexperienced persons from the frauds of those who lent money on annuities; and the provision for the enrolment of the securities being intended for the benefit of the grantor only, I think it is necessary to enrol those securities alone, which show the extent of his responsibility. Now that was necessary in *Rosher v. Hurdis*; for it may be concluded (though it is not expressly so stated in that case) that the grantor was there liable over to the obligor of the bond. But here there is no such liability on the part of Rowe to Marsh and Creed. I am there-

fore of opinion that it was not necessary to enrol this guarantee, and that on both grounds this rule must be discharged.

Rule discharged.

As a general rule each partner is the agent of the rest, and has power to bind them, whether they be active, nominal, or dormant, in transactions concerning the business of the firm. "In partnerships," says *Eyre*, C. J., in a well-known case, "both partners are authorized to treat for each other in everything that concerns or properly belongs to the joint trade, and will bind each other in transactions with every one who is not distinctly informed of any particular circumstances which may vary the case. On the other hand, when the transaction has no apparent relation to the partnership, then the presumption is the other way, and the partnership will not be bound by the acts of one of the partners without special circumstances." *Ex parte Agace*, 2 Cox, 316; and see *Armitage v. Waterbottom*, 1 Man. & Gr. 130; 1 Scott, N. R. 23; *La Marquise de Ribeyre v. Barclay*, 23 Beav. 107.

At first sight the principal case might appear scarcely to come within the rule as laid down by *Eyre*, C. J., as it was not part of the ordinary business of the partnership of Marsh and Creed as navy agents to guarantee annuities or to lay out the money of their customers in the purchase of them; but it will be observed that after Creed had signed the

guarantee on behalf of the firm without the knowledge of Marsh, a joint power of attorney was transmitted to Marsh and Creed, under which stock of their customer was sold and the annuity purchased: the question raised was whether the executors of Marsh were bound by the guarantee. The Court then seems to have assumed that the sale of stock must have appeared in the partnership books, "and if that fact were doubtful," observed *Abbott*, C. J., "it is proved by the balance stated in the accounts transmitted by the partnership: that sale, therefore, and the fact that the proceeds had been laid out in the purchase of an annuity, either were actually known or ought to have been known by Marsh." The conclusion then arrived at by the learned Judge was that if the whole transaction was known to Marsh, the guarantee, which was connected with it, became in point of law, *an assurance made by one partner with reference to business transacted by the firm*, and therefore binding upon both, according to the construction which he had put upon the general rule relative to the power of one partner to bind the firm. "It has undoubtedly," he observed, "been held that in a matter wholly unconnected with the part-

nership, one partner cannot bind the others. But the true construction of the rule is this, that the act and assurance of one partner, made with reference to business transacted by the firm, will bind all the partners."

Although partners agree among themselves not to do certain acts which would otherwise fall within the usual course of their business, one of them, by doing such acts, may bind the firm to a third party not aware of the arrangement. This is well illustrated in the principal case by *Abbott, J.*, who says, "That if two persons in partnership for the sale of horses, should agree between themselves never to warrant any horse; yet though this be their course of business, there is no doubt, that if, upon the sale of a horse, the property of the partnership, one of them should give a warranty, the other would be thereby bound." See also *The South Carolina Bank v. Case*, 8 Barn. & C. 427; 2 Man. & Ry. 459; *Smith v. Jameson*, 5 T. R. 601. And the law is the same when the persons sought to be bound are dormant partners. *Davies, Bank. L. 8*; *Watson, Partnersh. 169*.

Where however a person has notice of any arrangement between the partners, whereby the ordinary power of one to bind the rest is either taken away or limited, he will be bound by such arrangement. *Minnit v. Whinery*, 5 Bro. P. C. 489; 16 Vin. Abr. 244; *Vice v. Fleming*, 1 Y. & J. 227; *Ex parte Harris*, 1 Madd. 583.

To return, however, to the ap-

plication of the rule laid down at starting, we shall see that one partner may in general bind the rest in all transactions concerning the business. Thus, an individual partner may obtain a loan (*Rothwell v. Humphreys*, 1 Esp. 406; *Thicknesse v. Bromilow*, 2 C. & J. 431; *Brown v. Kidger*, 3 Hurlst. & N. 853), purchase goods (*Hyat v. Hare*, Comb. 383; *Bond v. Gibson*, 1 Campb. 185; *Dyke v. Brewer*, 2 Car. & K. 828), sell (*Lambert's case*, Godbolt, 244; *Fox v. Hanbury*, Cowp. 445), or pledge (*Metcalf v. Royal Exchange Association Co.* Barn. Ch. Rep. 343) the partnership effects even in the case of a particular adventure. *Raba v. Ryland*, Gow, N. P. C. 132; *Ex parte Gellar*, 1 Rose, 297; *Read v. Hollinshead*, 4 Barn. & Cress. 867; 7 Dowl. & Ry. 444; but see *Ex parte Copeland*, 2 Mont. & A. 177; 3 Dea. & Chit. 199.

A mere joint purchase or sub-purchase made without any view to a sale must be distinguished from a partnership in a particular adventure, inasmuch as a person who becomes a mere joint owner as distinguished from a partner, cannot by a sale or pledge affect more than his own share. *Barton v. Williams*, 5 Barn. & Ald. 395.

It may be here remarked that the implied authority of a partner to bind his copartners for the repayment of money borrowed for partnership purposes, does not necessarily extend to raising money for the purpose of increasing the fixed capital of the firm. Therefore a party advancing money to one partner,

knowing that it was for the latter purpose, cannot, as a matter of course, charge the other partners with the loan, unless the transaction took place with their express or actual authority. *Fisher v. Taylor*, 2 Hare, 218.

It is clear that one member of a partnership *in trade* has an implied authority to bind the firm by drawing, accepting, or indorsing a bill of exchange or giving a promissory note in the name of the firm (*Pinkney v. Hall*, 1 Salk. 126; 8 C. Lord Raym. 175; *Anon. Styles*, 370; *Harrison v. Jackson*, 7 T. R. 210; *Sutton v. Gregory*, 2 Peake, 150; *Thicknesse v. Bromilow*, 2 C. & J. 425), and all the partners will be liable whether they are named or not, and whether they are known or secret partners, unless the title of the person who seeks to charge them can be impeached. *Wintle v. Crowther*, 1 C. & J. 316, 318; *Baker v. Charlton*, 1 Peake, 111; *M'Nair v. Fleming*, Mont. Part. 32; *Swan v. Steele*, 7 East, 210; 3 Smith, 199; *Vere v. Ashby*, 10 B. & C. 288; *Lloyd v. Ashby*, 2 Barn. & Ad. 23.

When a bill is drawn upon a partnership in their usual style and firm, although it is accepted in the name of one partner only, it will be binding upon all. See *Wells v. Masterman*, 2 Esp. 731; *Mason v. Rumsey*, 1 Campb. 384; *Dolman v. Orchard*, 2 Car. & P. 104; *Jenkins v. Morris*, 16 M. & W. 877; see vide *Kirk v. Blurton*, 9 M. & W. 284.

Moreover if a partnership is conducted in the name of one of the

partners, as if a partnership of A. and B. is carried on in the name of A., a bill drawn and indorsed or accepted in the name of A. will bind the partnership, but it must be shown by the plaintiff that it was drawn by A. not as A., but as A. and B. *Ex parte Bolitho*, Buck. 100, 104; see also *The South Carolina Bank v. Case*, 8 B. & C. 427. But under particular circumstances the onus of showing that a single name is not used for the firm may lie upon the defendants. Thus, where a firm carried on their business under the name of A., and bills were indorsed in the name of A. and discounted by customers of the firm after A. had ceased to carry on his separate business, it was held by the Court of Queen's Bench that the onus of showing the indorsements were made on account of the separate business, and not on account of the general and ostensible business, lay on the defendants. *Furze v. Sharwood*, 2 Q. B. 388.

A partner however cannot, unless he has special authority (*Norton v. Seymour*, 3 C. B. 792), bind the firm by any other than the partnership name (*Kirk v. Blurton*, 9 M. & W. 284). But it seems that one of two partners might have authority to bind the other by signing the true names of both instead of the fictitious name of the partnership. Per Maule, J., in *Norton v. Seymour*, 3 C. B. 794. In that case however it was held that a special authority had been given to sign the note with the names of the two partners, and it was therefore held

to be binding upon them. See also *Ex parte Buckley*, 14 M. & W. 469; *MacLae v. Sutherland*, 3 Ell. & Bl. 1; *Forbes v. Marshall*, 11 Exch. 166.

Although there is a deviation in a signature from the partnership name, it will be binding upon the firm if it appears that there is not substantially any difference between the signature and the name of the partnership. "For instance, if the signature were Coal and Co., and the true designation were Cole and Co., it would no doubt be for the jury to say whether it was in substance the same." Per *Alderson*, B., 9 M. & W., 289; see also *Faith v. Richmond*, 11 Ad. & Ell. 339.

A firm may use one name for the general business of the firm, and may use another for the purpose of indorsing negotiable instruments which will be binding on the firm. Thus, in *Williamson v. Johnson*, 1 B. & C. 146, Habgood, Dixon, and Lye (who succeeded the firm of Habgood and Fowler) carried on business in partnership together, under the firm of Habgood and Co., and in that name all their transactions of buying and selling were carried on; but Dixon, the manager of the whole business, was in the habit of indorsing bills in the names of Habgood and Fowler, by procuration, for the purpose of getting them discounted; it was held that the firm was bound by such indorsements.

Although a partner is not liable upon bills or notes accepted or given by his copartners before he joined the firm, yet if a bill be ac-

cepted on account of a debt which was incurred partly before and partly after such partner joined the firm, he will be liable to so much of the debt for which the bill was accepted as became due after he entered into partnership. *Wilson v. Lewis*, 2 Scott, N. R. 115.

We must here notice a limitation to the rule that one partner has an implied authority to bind the firm by a bill of exchange or promissory note, for a partner has not such power where the business carried on by it is not strictly of a mercantile character. Thus an attorney (*Hedley v. Bainbridge*, 3 Q. B. 816; *Smith v. Coleman*, 7 Jur. 1053; *Levy v. Pyne*, Car. & M. 453), or a partner in a farming (*Greenslade v. Dower*, 7 B. & C. 635) or in a mining concern (*Dickinson v. Valpy*, 10 B. & C. 139) cannot bind the firm by a bill of exchange or a promissory note. The reason why a power of binding the other partners is not implied is, that in such cases the circulating of negotiable instruments is not necessary, as in the case of mercantile partnerships.

But in the case of partnerships which are not of a mercantile character, if it be shown that the power of one partner to draw or accept bills of exchange for the partnership is either necessary in that particular instance, or is usual in similar partnerships, it will be implied by the law. This subject was very fully discussed in the important case of *Dickinson v. Valpy*, 10 B. & C. 128, where it was held by the Court of Queen's Bench, that a partner

in a mining concern was not liable upon a bill drawn and accepted by order of the directors, it not having been proved that they had express authority to bind the other partners by drawing and accepting bills of exchange, or that it was necessary in that particular company, or usual in companies of the same kind, that they should have such authority. "In the case of an ordinary *trading* partnership," said *Littledale, J.*, "the law implies that one partner has authority to bind another by drawing and accepting bills, *because the drawing and accepting of bills is necessary for the purposes of carrying on a trading partnership*; but it does not follow that it is necessary for the purpose of carrying on the business of a mining company. Evidence of the nature of the company ought to have been given, to show that, in order to carry into effect the purposes for which it was instituted, it was necessary that individual members should have the power of binding the others by drawing and accepting bills of exchange. In the absence of any such evidence, I am of opinion that it is not competent to individual members of a mining company (which is not a regular trading company), to bind the rest by drawing or accepting bills. One of several persons jointly interested in a farm has no power to bind the others by drawing or accepting bills, because it is not necessary, for the purposes of carrying on the farming business, that bills should be drawn or accepted. The object of persons concerned in

such an undertaking is to sell the produce of the farm; and though, with a view to such sale, it may be necessary to buy many things in order to raise and put the produce in a saleable state, yet it is not necessary for that purpose that bills of exchange should be drawn. Even if that were necessary for the purpose of carrying on a mining concern, though not for the purpose of managing a farm, *it was incumbent on the plaintiff in this case to have shown, either, from the very nature of this company, that it was necessary, or, from the practice in other similar companies, that it was usual; for, if it were necessary or usual, it would be reasonable that the directors should have such a power, and the law would imply it.*"

But a coal mining company may be so constituted as to be considered a trading company; so that individual members of the firm might accept bills of exchange for partnership purposes so as to bind the firm. See *Brown v. Kidger*, 3 Hurlst. & N. 853: there the defendants were partners for the purpose of working a coal mine. Two of them conducted the business of the colliery. The firm being in debt, and two actions having been brought against them, the managing partners borrowed of the plaintiff, upon the credit of the firm, money for the purpose of settling these actions, and accepted in the name of the firm a bill of exchange drawn by him on them. The partnership deed contained a clause, "that if any partner *should for his own use, or for any other*

purpose than the immediate use of the partnership, draw, accept, or indorse any bill of exchange in the name of the firm," the others might determine his interest in the partnership. It was held by the Court of Exchequer that the managing partners had authority to bind the partnership by borrowing the money and accepting the bill. "I do not," said *Channel, B.*, "consider this a mining company as such a company is usually understood, but I look upon it as a *trading company*; and I think that there is nothing in the partnership deed to restrict the rights which the partners would have as ordinary trading partners. On the contrary, the clause referred to gives an implied authority to any partner to accept bills for partnership purposes. Still the question arises whether there was any evidence for the jury that the money was lent on the credit of the firm, and I think there was."

It seems, that ordinarily one partner cannot bind the firm by a guarantee for collateral purposes (*Duncan v. Lowndes*, 3 Campb. 478; *Hasleham v. Young*, 5 Q. B. 833; *Brettel v. Williams*, 4 Exch. 623); but where it is within the scope of the partnership dealings, one partner has power to do so (*Ex parte Gardom*, 15 Ves. 286; 2 Hov. Supp. 406; *Ex parte Nolte*, 2 G. & J. 306); and the firm may be bound although the guarantee may have been given out of the usual course of their business, if, as in the principal case, they have subsequently adopted it (*Crawford v. Stirling*, 4

Esp. 209), a question which will be left for the consideration of the jury. *Payne v. Ives*, 3 Dowl. & Ry. 664; and see — *v. Layfield*, 1 Salk. 292.

This subject was much discussed in the case of *Brettel v. Williams*, 4 Exch. 623: there one of a firm of railway contractors, without the consent or knowledge of his co-partners, signed in the name of the firm a guarantee for payment of coals to be supplied to Messrs. Unit and Roberts, who had entered into a subcontract with the firm. It was held by the Court of Exchequer that the guarantee was not binding on the firm. "It was contended for the plaintiffs," said *Parke, B.*, "that though one partner could not bind another by a guarantee for collateral purposes, he had that power where the guarantee was connected with the partnership business, and a reasonable mode of giving effect to a transaction within the scope of the partnership dealings; and he relied on the case of *Ex parte Gardom* (15 Ves. 286). That one of two partners engaged in business as merchants had not by reason of that connection alone, power to bind the other by a guarantee apparently unconnected with the partnership trade, was decided by Lord *Ellenborough* in the case of *Duncan v. Lowndes* (3 Campb. 478); and the Court of Queen's Bench gave a similar decision in that of *Hasleham v. Young* (5 Q. B. 833), where the defendants were in partnership as attorneys. No proof was given in either of these

cases of the previous course of dealing or practice of the partners, which, it is admitted in both cases, might be sufficient to prove a mutual authority; nor was any evidence given of the usage of similar partnerships to give such guarantees; nor was there any of a recognition and adoption by the other partners, which would have the same effect. The case of *Sandilands v. Marsh* (2 B. & Ald. 673) proceeded on the latter ground. In the present case, no evidence was given to show the usage of the defendants in this particular business, or of others in a similar business; nor was there any evidence of the sanction by the other defendants of the act of their co-partner Simply as railway contractors they could not have any such power. The only question then is, whether they had it in this particular case, in consequence of its being a *reasonable* mode of carrying into effect an acknowledged partnership contract. We think that position cannot be maintained. One partner does communicate to the other, simply by the creation of that relation and as incident thereto, all the authority necessary to carry on their partnership in its ordinary course (see *Hawtayne v. Bourne*, 7 Mees. & W. 595), and all such authority as is usually exercised by partners in the same sort of trade, but no more. To allow one partner to bind another by contracts out of the apparent scope of the partnership dealings, because they were reasonable acts towards effecting the partnership

purposes, would be attended with great danger. Could one of the defendants in this case have bound the others by a contract to lease or buy lands, or a coal mine, though it might be a reasonable mode of effecting a legitimate object of the partnership business? Our opinion is, that one partner cannot bind the others in such a case, simply by virtue of the partnership relation. In the case of *Ex parte Gardom*, this point was not fully discussed, but given up by Sir *S. Romilly*, who had two other objections to the guarantee on which he could rely, and on one of which he succeeded. Besides, we are not sufficiently informed by the report, whether there might not have been some peculiar circumstances in the case which caused the abandonment of that point."

It has been before shown when an individual partner can bind the firm by such contracts as loans, purchases, sales, pledges, bills of exchange, and promissory notes. The implied power however of a partner is much more extensive, for in the words of Lord *Tenterden* in the principal case, "the *act and assurance* of one partner, made with reference to business transacted by the firm, will bind all the partners." Hence an acknowledgment (*Hodenpyl v. Vingerhoede*, Chitt. Bills, 381, n. 7th ed.; *Gray v. Palmers*, 1 Esp. 135) or admission (*Wood v. Braddick*, 1 Taunt. 104; *Pritchard v. Draper*, Russ. & My. 199; *Cheap v. Cramond*, 4 Barn. & Ald. 663) of one partner with reference to the transactions of the

firm, or a promise by one partner to pay a debt as a partnership debt, will be considered as a promise by the firm. *Lacy v. M'Neil*, 4 Dowl. & Ry. 7. Upon the same principle it has been held that one partner had power to bind the firm by his assent to the transfer of their account, with a balance due from them by their former, to a new banker. *Beale v. Caddick*, 2 Hurlst. & Norm. 326.

Part payment of principal or interest by one of several partners or co-contractors was formerly considered as made by him as agent for all the other partners and co-contractors, and operating as a new promise to pay, was a good answer against the plea of the Statute of Limitations. See *Whitcomb v. Whiting*, Dougl. 651; *Wyatt v. Hodson*, 8 Bing. 309; *Burleigh v. Stott*, 8 B. & C. 36; 2 Man. & Ry. 93. The law however has been recently altered by the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), which enacts that "in reference to the provisions of the Acts of 21 James I. c. 16, s. 3, and of the Act of the 3 & 4 Will. VI. c. 42, s. 3, and of the Act of 16 & 17 Vict. c. 113, s. 20, when there shall be two or more co-contractors or co-debtors, whether bound or liable jointly only or jointly and severally, or executors or administrators of any contractor, no such co-contractor, or co-debtor, executor, or administrator, shall lose the benefit of the said enactments or any of them, so as to be chargeable in respect or by reason only of payment of any principal,

interest, or other money, by any other or others of such co-contractors or co-debtors, executors or administrators." Sect. 14. Sir R. T. Kindersley, V. C., in *Thompson v. Waithman*, 3 Drew. 628, held that this section of the Act was retrospective, so that although the right of action had accrued in consequence of a payment made by a co-contractor before the passing of the Act, yet inasmuch as its operation was retrospective, the other co-contractors could take advantage of the Statute of Limitations. This construction of the Act was followed by the Court of Queen's Bench in *Jackson v. Wooley* (6 W. R. 223, Q. B. 4, Jur. N. S. 409), but that case was afterwards reversed on appeal by the Court of Exchequer Chamber (6 W. R. 686, Exch. 4 Jur. N. S. 656).

It seems moreover to be doubtful whether a co-partner is an agent duly authorized under the 13th section of the Mercantile Law Amendment Act, 1856, to make an acknowledgment or promise in writing, so as to keep alive a debt barred by 9 Geo. IV. c. 14.

Even before this statute, the acts of surviving partners of a firm had not the effect of keeping a debt alive against the representatives of a deceased partner. See *Atkins v. Tredgold*, 2 B. & C. 23; *Slater v. Lawson*, 1 B. & Ad. 396; *Ault v. Goodrich*, 4 Russ. 430; *Way v. Bassett*, 5 Hare. 55, 67.

A partner has not an implied authority to bind the firm by a submission to arbitration. This was clearly laid down in *Stead v. Salt*,

10 Moore, 389, 3 Bing. 101, where the partnership was not general, but only in dealings to which the award referred. It has however been followed in the case of general partnership. Thus, in *Adams v. Bankart*, 1 C. M. & R. 681, where the submission to arbitration was made by one only of three general partners, it was held by the Court of Exchequer not to be binding on the firm. "The authority," said *Parke, B.*, "to bind a partner to submit to arbitration does not flow from the relation of partnership, and where it is relied upon, it must, like every other authority, be proved either by express evidence, or by such circumstances as lead to the presumption of such an authority having been conferred. The case of *Stead v. Salt* shows that the relation of partnership does not communicate any such power as that which has been contended for." See also *Boyd v. Emerson*, 2 Ad. & Ell. 184; *Antram v. Chace*, 15 East, 209; *Goddard v. Ingram*, 3 Q. B. 839; 3 Gale & Dav. 46.

Upon the same principle one partner has no implied authority to consent to an order for a judgment in an action against himself and his co-partner. *Hambidge v. De La Crouée*, 3 C. B. 742.

A partner, however, who has entered into a submission to an award, will himself, on the refusal of his partner to be bound by it, be liable to an action for damages. *Strangford v. Green*, 2 Mod. 228.

The partnership will not be bound by any contract entered

into by one of the partners if it be not in the name of the partnership, even although it may have derived a profit thereby. Thus, if one of two more partners signs a promissory note (*Siffkin v. Walker*, 2 Campb. 308), draws (*Emly v. Lye*, 15 East, 7) or accepts (*Kirk v. Blurton*, 9 M. & W. 284) a bill of exchange, executes a warrant of attorney (*Bevan v. Lewis*, 1 Sim. 376), or borrows a sum (*Loyd v. Freshfield*, 2 Carr. & P. 325) in his own name only, the firm will not be liable even although the money arising from such transactions be applied by the partner who procured it for the benefit of the firm. See also *Ex parte Hunter*, 1 Atk. 223; *Ex parte Emly*, 1 Rose, 61; *Smith v. Craven*, 1 Crompt. & J. 500; *Wilson v. Whitehead*, 10 Mees. & W. 503; see and consider *Ex parte Raleigh*, 3 Mont. & A. 670; 3 Deac. 160; *Bishop v. Countess of Jersey*, 2 Drew. 143.

But if a member of a firm purchases goods in which the firm usually deals, and afterwards applies them to its use, a presumption may arise that he was dealing on behalf of the firm, although such presumption may not have arisen had he borrowed money and applied it to the use of the firm. See *Ex parte Emly*, 1 Rose, 61; *Colley v. Smith*, 2 M. & Rob. 96; *Gouthwaite v. Duckworth*, 12 East, 421.

This last class of cases must not be confounded with another at first sight somewhat similar, where the contract is in reality entered into by the partnership, though a secu-

urity is given only by one of the partners, for in such case the partnership (at all events where it has derived benefit from the contract), though not liable upon the security, may be liable under their general contract. See *Ex parte Brown*, 1 Atk. 225 cited; *Ex parte Bonbonus*, 8 Ves. 542; *Denton v. Rodie*, 8 Campb. 498; *Ex parte Bolitho*, Buck, 100; *Robinson v. Gleadow*, 2 Bing. N. C. 156; *Broune v. Gibbins*, 5 Bro. P.C. 491; *South Carolina Bank v. Case*, 8 B. & C. 427; *Loyd v. Freshfield*, 2 C. & P. 825; *Beckham v. Drake*, 9 M. & W. 79; 11 M. & W. 315.

No contract, however, of one of the partners will bind the firm if it be wholly unconnected with the partnership business. Thus, in *Ex parte Agace*, 2 Cox, 312, one of two partners took an assignment of a bond to the firm in consideration of five acceptances signed by him for the firm. The assignor had been falsely informed by the partner who signed the acceptances, that the other partner was acquainted with the transaction and that it was with his consent, whereas he was a total stranger to it; and when he found it out, immediately expressed his disapprobation in the strongest terms, and insisted upon an immediate dissolution of the partnership. It was held by Lords Commissioners *Eyre* and *Ashurst*, upon the bankruptcy of the partners, that the bills could not be proved against the firm. "In partnership," said *Eyre*, L. C., "both parties are authorized to treat for each other in every thing that concerns or properly belongs to

the joint trade, and will bind each other in transactions with every one who is not distinctly informed of any particular circumstances which may vary the case. On the other hand, if the transaction has no apparent relation to the partnership, then the presumption is the other way, and the partnership will not be bound by the acts of one of the partners without special circumstances." See also *Armitage v. Winterbottom*, 1 Man. & Gr. 130; 1 Scott, N. B. 23.

The firm will not be bound by any securities obtained fraudulently from one of the partners by the person claiming against them. Thus if negotiable instruments, such as bills of exchange or promissory notes, be given by one of the firm in its name, and fraud or collusion can in any way be shown, as for instance where the transaction indicates that the money was for the individual partner's own use, and was not raised on the partnership account, the partnership will not be bound by such securities (*Arden v. Sharpe*, 2 Esp. 524; *Hope v. Cust*, 1 East, 53, cited; *Shirreff v. Wilks*, 1 East, 48; *Green v. Deakin*, 2 Stark. 347; *Jones v. Yates*, 9 B. & C. 532; *Snaith v. Burridge*, 4 Taunt. 684; *Ex parte Goulding*, 2 Glyn. & J. 118; *Ex parte Thorpe*, 3 Mont. & A. 716), even if they get into the hands of an indorsee, unless he can prove that he gave a valuable consideration for them. *Heath v. Sansom*, 2 B. & Ad. 291.

An indorsee for value however, who obtained them without fraud (*Wintle v. Crowther*, 1 C. & J. 316;

Ex parte Bushell, 3 Mont. D. & De G. 615; *May v. Chapman*, 16 M. & W. 355) or without knowing that they had been fraudulently obtained (*Swan v. Steele*, 7 East, 210; *Lacy v. Woolcott*, 2 D. & R. 458), might enforce them against the partnership.

On the receipt of money by a partner to be employed for any purpose of the firm, if it be part of their business to receive money for such purpose, they will be bound thereby, although the partner who received the money should misappropriate it. Thus, if one of a firm of attorneys received a sum of money from a client for the purpose of its being invested on a *particular security*, the other partners are liable to account for it, such a transaction coming within the ordinary business of an attorney. *Harman v. Johnson*, 2 Ell. Bl. 61; *Blair v. Bromley*, 5 Hare, 542; 2 Ph. 354; *Sims v. Brutton*, 5 Exch. 802; and see *Willet v. Chambers*, 2 Cowp. 814.

The receipt however of money by one of a firm of attorneys from a client professedly on behalf of the firm, for the *general purpose of investing it, as soon as he can meet with a good security*, is not an act within the scope of the ordinary business of an attorney, so as without further proof of authority from his partners to render them liable to account for the money so deposited; such a transaction being part of the business of a scrivener, and attorneys as such not necessarily being scriveners. *Harman v. Johnson*, 2 Ell. Bl. 61; *Bourdillon v. Roche*, 6 W. R. 618.

Although it is clear from all the cases upon the subject, that it lies upon a separate creditor who has taken a partnership security for the payment of his debt, if it be taken *simpliciter*, and there is nothing more in the case, to prove that it was given with the consent of the other partners; yet if there be circumstances to show a reasonable ground of belief that it was given with the consent of the partnership, it will lie upon the partners to prove the fraud. See *Frankland v. M'Gusty*, 1 Knapp, Priv. C. C. 274, 301, 302; *Ridley v. Taylor*, 13 East, 178; *Ex parte Kirby*, Buck, 511.

Where money is advanced to an individual partner in the ordinary course of commercial transactions, as upon the discount of a bill of exchange signed by him in the name of the firm, the mere knowledge of the creditor that the money advanced has been carried to the account of the individual partner, will not of itself be sufficient to rebut the liability of the partnership. *Ex parte Bonbonus*, 8 Ves. 540; 2 Hov. Supp. 182.

Although *prima facie* the partnership will not be bound by a security given by an individual partner for his own purposes, as to secure an antecedent debt, it will nevertheless be bound if it can be shown that he had the previous authority of the firm or their subsequent approbation—(a strong case of subsequent approbation, raising an inference of previous positive authority). *Ex parte Bonbonus*, 8 Ves. 540, 543, 544.

As a general rule in the course of proceedings at law or in equity the act or admission of one partner, and likewise notice to one partner, is binding upon the firm. For instance, one partner agreeing to stay proceedings (*Harwood v. Edwards*, Gow, Partn. 65) or entering an appearance (*Harrison v. Jackson*, 7 T. R. 207) may bind the rest. Again, notice by one partner, in legal proceedings (*Mayhew v. Eames*, 1 Car. & P. 550) or, in the case of an insurance of a cargo, of abandonment (*Hunt v. Royal Exchange Assurance Company*, 5 M. & S. 47) will be sufficient. So although in an ordinary case one of two or more joint lessors not in trade cannot give a valid notice to quit (*Goodtitle v. Woodward*, 3 Barn. & Ald. 689), he can do so if the joint lessors hold the lease as partners in trade. *Doe v. Hulme*, 2 Man. & Ryl. 433.

Upon the same principle a firm will be bound by the frauds committed upon innocent parties by one of the partners in matters connected with the partnership. For instance, if one of the partners purchases for the partnership goods used in the partnership business, which he, without any collusion on the part of the seller, converts to his own use (*Bond v. Gibson*, 1 Campb. 185), if he fraudulently negotiates a partnership security which gets into the hands of an indorsee for value without notice of fraud (2 Esp. 525; *Lacy v. Woolcott*, 2 Dowl. & Ryl. 458; *Sander-son v. Brooksbank*, 4 Car. & P. 286; and see *Richmond v. Heapy*, 1 Stark.

202; *Johnson v. Peck*, 3 Stark. 66; *Jacaud v. French*, 12 East, 317; *Sparrow v. Chisman*, 9 Barn. & Cres. 241; 4 Man. & Ry. 206), converts to his own use moneys of customers lodged with the firm as bankers (*Stone v. Marsh*, Ry. & Mood. 364; 6 Barn. & Cres. 551; 8 Dowl. & Ry. 71; *Keating v. Marsh*, 1 Mont. & A. 582; 2 Cl. & Fin. 250; and see *Hume v. Bolland*, Ry. & Mood. 371; *La Marquise de Ribeyre v. Barclay*, 23 Beav. 107), makes a fraudulent statement (*Rapp v. Latham*, 2 B. & Ald. 795), or fraudulently colludes with the partner of another firm (*Longman v. Pole*, 1 Mood. & Malk. 222; *Danson & Lloyd*, 126), his own firm will be liable. See also *Brydges v. Branfill*, 12 Sim. 369.

Where however a firm is liable for the fraud of an individual partner, it must have been committed in a matter within the scope of the partnership business. *Bishop v. Countess of Jersey*, 2 Drew. 143.

Moreover the firm may be liable for a wrong (*Moreton v. Hardern*, 4 Barn. & Cres. 228; 6 Dowl. & Ry. 275; and see *Nicoll v. Glennie*, 1 M. & S. 588), or breach of the revenue laws (*The Attorney-General v. Stanneyforth*, Bunb. 97; *Attorney-General v. Burges*, Bun. 223; *Edmonson v. Davis*, 4 Esp. 14; *King v. Manning*, Com. Rep. 616), committed by one of their co-partners. And in some cases not only civilly but criminally. *Rex v. Almon*, 5 Burr. 2686; *Rex v. Pearce*, 1 Peake, 75; *Rex v. Topham*, 4 T. R. 126.

As a general rule, a partner, unless under an express power by deed (*Horsley v. Rush*, 7 T. R. 209, cited; *Appleton v. Binks*, 5 East, 148; *Berkeley v. Hardy*, 8 Dowl. & Ry. 102), cannot bind the partnership by a deed. Thus, in *Harrison v. Jackson*, 7 T. R. 207, where a person signed a deed purporting it to be executed for himself and his partners, the Court of Queen's Bench held that the execution of the deed was not binding on the partners who had not signed it. "The law of merchants," said Lord Kenyon, C. J., "is part of the law of the land; and in mercantile transactions, in drawing and accepting bills of exchange, it never was doubted but that one partner might bind the rest. But the power of binding each other by deed is now for the first time insisted on, except in the *Nisi Prius* case of *Mears v. Serocold*, cited, the facts of which are not sufficiently disclosed to enable me to judge of its propriety. . . . This would be a most alarming doctrine to hold out to the mercantile world. If one partner could bind the others by such a deed as the present, it would extend to the case of mortgages, and would enable a partner to give to a favourite creditor a real lien on the estates of the other partners." See also *Hall v. Bainbridge*, 1 Man. & Gr. 42.

A general partnership agreement, though under seal, does not authorize the partners to execute deeds for each other, unless a particular power be given for that purpose. Per Lord Kenyon, C. J.,

in *Harrison v. Jackson*, 7 T. R. 210.

The subsequent acknowledgment by one partner that he has given another partner power to execute a deed, will not, where the power is not given by deed, be sufficient to bind the partner who did not execute the deed (*Steiglitz v. Egginton*, Holt, N. P. C. 141; *Brutton v. Burton*, 1 Chit. 707), although it will bind the partner who did so. *Elliot v. Davis*, 2 Bos. & P. 338.

Where however a person executes a deed (*Ball v. Dunsterville*, 4 T. R. 313; and see *Lord Lovelace's* case, Sir W. Jones, 268) or bond (*Burn v. Burn*, 3 Ves. 573; 1 Hov. Supp. 410; *Orr v. Chase*, 1 Mer. 729) for himself and his partners in the presence of the latter and by their authority, although there be but one seal, all will be bound. See and consider *Smith v. Winter*, 4 Mees. & W. 454.

It seems moreover that, although as a general rule one partner cannot by deed bind the firm except under an express power by deed, the rule must be confined to those cases where the deed operates by way of *grant*, for where it operates by way of *release*, it will be binding on the firm. See 2 Roll. Abr. 410 (D); *Perry v. Jackson*, 4 T. R. 519; *Hawkshaw v. Parkins*, 2 Swanst. 539, 544; *Furnival v. Weston*, 7 Moore, 356. These cases appear to proceed upon the principle that "where a person has received satisfaction for a joint demand, due to himself and others, which puts an end to such joint

demand, he cannot afterwards, by joining the other parties with him as plaintiffs, recover that debt." *Wallace v. Kelsall*, 7 Mees. & W. 264, 274.

A covenant however by one partner not to sue for any debt due to him, cannot be pleaded as a release in bar of an action by the two partners for a debt due to them jointly. *Walmsley v. Cooper*, 11 Ad. & Ell. 216.

Although a deed executed by one partner will not bind the firm, by taking effect as the deed of the firm, nevertheless where the transaction itself is one within the authority of the partner, the circumstance of a deed being executed

will not invalidate the contract. *Ex parte Bosanquet*, 1 De Gex, 432, 439; and see *Hunter v. Parker*, 7 Mees. & W. 322.

A warrant of attorney under seal, executed by one person for himself and his partner, in the absence of the latter, *but with his consent*, is a sufficient authority for signing judgment against both. *Brutton v. Burton*, 1 Chit. 707. This however appears to proceed upon the principle that a warrant of attorney need not be under seal, and that therefore a parol authority to execute it is sufficient. See *Kianorsley v. Muscen*, 5 Taunt. 264.

CRAWSHAY v. MAULE.

MAULE v. CRAWSHAY.

June 9, 10, 27; July 11, 23, 31, 1818.

[REPORTED 1 SWANST. 495.]

PARTNERSHIP—DISSOLUTION OF, BY DIFFERENT MODES—EFFECTS OF.]—*R. C., being in possession of mines and iron-works held under leases of unequal duration, by his will bequeathed £25,000 to B., "as a capital for him to become a partner with my executor of one-fourth share in the trade of all those works so long as the lease endures," with a devise to H. and his wife of the residue of his estates, real and personal. By a codicil the testator gave to W. C. three-eighths of the concern at the iron-works, "so the partnership will stand at my decease,—W. C. three-eighths, H. three-eighths, B. two-eighths." After the testator's death, W. C., H., and C., carried on the works for two years, selling iron manufactured not only from the produce of their mines, but from ore and old iron purchased for the purpose of manufacture and resale. B., having then assigned his share to C., the business was carried on in like manner by C. and H. till the death of the latter; no agreement having ever been entered into for the duration of the partnership.*

1. *The codicil withdraws the trade from the operation of the residuary clause in the will, and vests three-eighths in H., to the exclusion of his wife.*
2. *The concern is not a mere joint interest in land, but a partnership in trade.*
3. *The purchase of a leasehold interest as part of a stock in trade, is not evidence of an agreement to contract a partnership commensurate with the duration of the lease.*
4. *The partnership is dissolved by the death of H.*
5. *In a suit instituted by W. C., praying a sale of the partnership*

property, the Court, on motion, directed an inquiry whether it would be for the benefit of all parties interested that the works should be sold or carried on for the purpose of winding up the concern.

By articles of agreement, dated the 31st of July, 1794, between Anthony Bacon and Richard Crawshay, Bacon agreed to assign to Crawshay all his interest in certain lands and mines of coal and iron ore, situate at Cyfarthfa, in the county of Glamorgan (of which he was then in possession, under three leases for terms of ninety-nine years each, commencing respectively in the years 1763, 1765, and 1768), subject, after the 29th of September, 1815, to an annual rent of £5000, and a payment of 15s. a ton on all pig-iron annually made on the premises beyond 6400 tons. Richard Crawshay accordingly took possession of the premises, and carried on iron-works there; and in 1801, intending an extension of the works and the erection of new furnaces, it was agreed between him and Bacon that the payment of 15s. a ton beyond 6400 tons should cease at 10,700 tons. Disputes having arisen on the subject of that agreement in 1808, Richard Crawshay filed a Bill to compel specific performance. The decree pronounced in March, 1810, directed Bacon to execute to Richard Crawshay an underlease of the premises, for all the terms which he or the trustees under his marriage settlement had therein, except the last day, subject to the yearly payments stipulated.

Richard Crawshay being seised and possessed of a considerable real and personal estate, including the iron-works at Cyfarthfa, and the buildings and machinery thereon, and a leasehold wharf at Cardiff, used for shipping iron, by his will, dated the 26th of September, 1809, after giving among other legacies £100,000 to his son William Crawshay, gave to Joseph Bailey £25,000, "to be transferred from my account in the ledger to his, intended as a capital for him to become a partner with my executor of one-fourth share in the trade of all those works so long as the lease endures, with the principal and profits therefrom to be his own for ever." He then gave to Benjamin Hall, Esq., and his wife, of Abercarne, and to their heirs for ever, all the residue of his estate, real and personal, and appointed Mr. Hall sole executor. By a codicil, dated the 4th of May, 1810, the testator gave to his son William Crawshay "three-eighth shares of my concerns at this iron-work, and of the premises at Cardiff; so the partnership will stand at my demise,—William Craw-

shay, three-eighths; Benjamin Hall, three-eighths; Joseph Bailey, two-eighths."

The testator died on the 27th of June, 1810; Mr. Hall proved his will, and William Crawshay, Hall, and Bailey, took possession of the iron-works, and carried them on as co-partners in the shares bequeathed to them, under the firm of Crawshay, Hall, and Bailey, but without any articles of co-partnership. In October, 1812, William Crawshay purchased the share of Bailey for £30,000, and from that time the works were conducted by William Crawshay and Hall, till the death of the latter, under the firm of Crawshay and Hall; no written articles of co-partnership were ever executed or prepared between them; but they verbally agreed that the future capital of the concern should be £160,000, which consisted of an imaginary or estimated value of the whole of the partnership property (£100,000 standing to the credit of William Crawshay, in respect of his five-eighth parts, and £60,000 to the credit of Mr. Hall, in respect of his three-eighth parts); and that the books should be balanced on the 31st of March in each year, and the annual profits drawn out by William Crawshay and Hall, in proportion to their shares.

No underlease having been executed in the life of Crawshay, by indenture of the 21st of May, 1814, Bacon and his trustees, in obedience to the decree of 1810, assigned to Hall, his executors, etc., all the premises for the residue of the respective terms, except the last day of each, subject to the annual rent of £5000 and the payment of 15*s.* a ton on all pig-iron made yearly on the premises above £6400 tons, and not exceeding 10,700 tons; and by a deed dated the 1st of June, 1814, and indorsed on the assignment, Hall declared that he would stand possessed of the premises, as to three-eighth parts, in trust for himself, and as to five-eighth parts, in trust for William Crawshay; and Hall and William Crawshay entered into covenants for payment of their respective proportions of rent, and for mutual indemnity.

By indenture, dated the 23rd of May, 1814, Bacon, in consideration of £32,500,—paid, three-eighths by Hall and five-eighths by William Crawshay,—assigned to Joseph Kaye, his executors, etc., in trust for Hall and Crawshay, in the proportion of three-eighths to the former and five-eighths to the latter, the rent of 15*s.* per ton on iron, then due or to become due. By another indenture of the same date, Bacon, in consideration of £62,500, assigned to Kaye, in trust for William Crawshay, his reversionary interest in the premises, and the annual rent of £5000.

On the 1st of June, 1814, Bailey, in execution of the agreement of October 1812, assigned to William Crawshay his share in the partnership property.

On the 31st of July, 1817, Mr. Hall died, leaving four sons (the eldest of the age of fifteen years) and a daughter. By his will, dated the 8th of the same month, he devised to George Maule, John Llewellyn, and Joseph Kaye, all his freehold, copyhold, and leasehold estates (except trust and mortgage estates and the estates in which he was interested as a partner with William Crawshay at Cyfarthfa), in trust, subject to the payment of debts and legacies in aid of his personal estate, for the benefit of his children. He then declared, that if he should have one or more son or sons living at his decease, or born in due time after, but no such son should then have attained the age of twenty-one years, it should be lawful for his trustees, and the survivors and survivor of them, and the executors, etc., of such survivor, to carry on the iron-works and other mercantile or trading concerns in which he should be concerned at his decease, if they should judge it for the benefit of the persons interested in his property under his will; and that if they should carry them on, then, during such time as his having such a son should be in suspense, it should be lawful for them to cause or permit any part of the stock in trade or effects which should be employed in or belong to the said works or concerns at his decease, to be employed in carrying on the same; and he exempted the stock in trade and effects so to be employed from the payment of his debts, to the extent and in the manner thereafter mentioned. The testator also declares, that if his son who first or alone should attain the age of twenty-one years should be desirous to have the iron-works and concerns or any of them continued, and should signify such desire to his trustees by any writing under his hand, the amount of the stock and effects then employed therein should be valued, and his said son should pay (or secure in manner therein mentioned) to the trustees the money at which such stock and effects should be estimated. The testator then directed the application to be made by his trustees of the profits of the iron-works during the suspense of his having a son who should attain twenty-one years, and of the amount of the valuation to be paid or secured by his son as before mentioned; and declared that if his iron-works and other concerns should be so carried on, and his son who first or alone should attain the age of twenty-one years should decline to carry on the same, or to give such security for the stock and effects

employed therein, or if while it should be in suspense whether he should have any such son, his trustees should deem it advisable to discontinue the said iron-works and concerns, in either of such cases the iron-works and concerns should be discontinued, and the stock and effects employed in the same should be sold and disposed of in such manner as his trustees should judge prudent and reasonable, and the money arising from the sale, and the gains and profits previously arising from the iron-works and concerns, should be disposed of in the manner in which he had directed the gains and profits, and the money to be paid or secured by his son, in the event before mentioned, to be paid or applied, or as near thereto as circumstances would admit. The testator then appointed Maule, Llewellyn, and Kaye, executors of his will, and guardians and managers of the estate of his children during their minorities, and he also appointed his executors and his wife guardians of the persons of his children, and he authorized his trustees to employ any persons in the management of the iron-works and concerns, at such salary, and to repose in them such trust or authority in conducting the trade, and in the management and disposal of the estate employed or to be employed, and in the receipt of any debts to be contracted therein, as his trustees should in their discretion think fit.

On the 12th of August, 1817, William Crawshay sent a written notice to the executors of Hall, that he considered the partnership absolutely dissolved by Hall's death, and would not consent to carry on the works in conjunction with his representatives.

The bill in the first cause filed by William Crawshay against the executors of Mr. Hall prayed a declaration that the partnership between the plaintiff and Hall, in the iron-works and all the trade and business thereof, became absolutely dissolved or determined, by the death of Mr. Hall, or from that period; an account of the partnership dealings, from the foot of the last settlement thereof previous to his death, and payment of the balance (after satisfaction of the partnership debts) between the plaintiff and the executors of Mr. Hall, according to their respective interests; a sale of all the partnership effects, and a division of the proceeds.

The defendants, the executors of Hall, admitted that no written articles were ever entered into between William Crawshay and Hall, any such articles, as they believed, being considered unnecessary, inasmuch as the proportions to which the parties were entitled in the leasehold premises and the leases sufficiently ascertained their rights and interests as long as the leases endured. They denied

that by the death of Hall, his interest in the premises and iron-works determined or was in any respect affected, submitting that they were entitled to the premises and iron-works, as tenants in common with William Crawshay, for the residue of the terms of years for which they were holden, and to carry on iron-works for the benefit of the family of Hall, in the same manner as he carried on the same with William Crawshay, and according to the directions in his will, until one of his sons should attain the age of twenty-one years. They stated that the iron-works were absolutely necessary to the beneficial enjoyment of the leasehold premises; and they insisted, that it appeared from his will and codicil to be the intention of Richard Crawshay that his legatees should, for themselves and their representatives and families respectively, have an interest in the leasehold premises and iron-works, commensurate with the terms for which they were holden; that the joint interest which William Crawshay and Hall had therein was not an interest in an ordinary trading partnership, but an interest given by Richard Crawshay to them for the benefit of themselves and their respective families, commensurate with the terms of years for which the leasehold premises were holden; and that therefore no sale of the property ought to be directed by the Court in opposition to the bequest of Richard Crawshay, and to the will of Hall, whose family would in that event be deprived of the benefits intended and contemplated by him, to be derived from the leasehold premises and iron-works.

The bills in the second cause, filed by the executors and the children of Mr. Hall, against William Crawshay, prayed a declaration that the executors were entitled to the leasehold premises and iron-works, for three-eighth parts thereof, as tenants in common with William Crawshay (who was entitled to the other five-eighth parts), until one of the sons of Hall should attain the age of twenty-one years, and to carry on the iron-works with William Crawshay, for the benefit of the family of Hall, in the same manner as Hall carried on the same, and according to the directions of his will, until one of his sons should attain the age of twenty-one years, and that then such son, if he chose, would be entitled to the said leasehold premises and iron-works, for three-eighth parts thereof, as tenant in common with William Crawshay, for the remainder of the said terms of years, and to carry on the iron-works with William Crawshay accordingly. The bill also prayed the consequential accounts and directions.

June 9th.—On this day a motion was made on behalf of William

Crawshay, that it might be referred to the Master, to consider and approve a proper plan for the sale and disposal of the whole of the co-partnership, iron-works, property, estate, and effects, including the goodwill of the joint trade, and that the Master might proceed to a sale thereof immediately.

Sir *Samuel Romilly*, Mr. *Bell*, Mr. *Horne*, and Mr. *Rigby*, in support of the motion.

The partnership, subsisting without any agreement for its continuance during a certain term, was dissolved by the death of Mr. Hall. As long as the surviving partner carries on the trade with the original capital, the representatives of the deceased are, according to the doctrine of *Crawshay v. Collins* (15 Ves. 218), entitled to an account of the profits; but it is by no means clear that the surviving partner could render them responsible for a loss; an event of probable occurrence in a business producing very uncertain returns, highly profitable in some years, and in others proportionately disadvantageous. Mr. Crawshay, therefore, insists on his right to a judicial declaration of the dissolution of the partnership. The object of the motion is not to obtain the effect of a hearing; the decree would direct an account as well as a sale. But were the order for a sale decretal, the Court would not, on that objection alone, compel the surviving partner to carry on the trade, during the interval which must elapse before a decree can be obtained, upon the terms of admitting the representatives of the deceased to a participation in the profits, without being entitled to obtain from them contribution for a loss. *Waters v. Taylor* (15 Ves. 10), *Forman v. Homfray* (2 V. & B. 329), *Featherstonhaugh v. Fenwick* (17 Ves. 298).

Sir *Arthur Pigott*, Mr. *Hart*, and Mr. *Winthrop*, against the motion.

The order sought is decretal, and cannot be obtained on motion. The object of Mr. Crawshay's suit is, a judicial declaration of the dissolution of the partnership and a sale. The Court will not, by their summary proceeding, supersede the established rules which protect its suitors and itself from premature decision.

Were the order in its nature interlocutory, at least it cannot be obtained on this application. The motion though entitled in both causes, can be made only in the first, the object of the second being foreign; and to the first cause, neither the widow or the children of Mr. Hall are parties. Under the residuary clause in the late Mr.

Crawshay's will, Mrs. Hall became entitled to the residue, including the iron-works and stock-in-trade, as joint tenant with her husband; that interest was not devested by the codicil, and at the death of her husband, the whole devolved on her by survivorship; she is therefore a necessary party; and before the suits can proceed, the posthumous son of Mr. Hall born since their institution must be brought before the Court.

Independently of these preliminary objections, the order cannot be obtained on the merits. First, this is a case, not of partnership in trade, but of joint interest in land; each party may apply for a partition, or sell his own share, but cannot compel a sale of the whole. The manufacture of the produce was merely a mode of enjoyment of the land, not a trade. Next, the leases taken during long terms of years, for the purposes of the partnership, amount, in the absence of express agreement on that subject, to evidence of an intention to continue the partnership during the continuance of the leases. Lastly, it was the manifest intention of the late Mr. Crawshay, in the provisions of his will, that the duration of the partnership should be commensurate with the duration of the leases. The legacy of £25,000 to Mr. Bailey is given expressly as a capital for him to become a partner "so long as the lease endures."

Lord Chancellor *Eldon*.—An important consideration is, whether this business is such as would subject the parties to become bankrupts. The distinction is obvious, and for this purpose material, between a partnership in trade and a joint interest in land. As between tenants in common, the Court does not dissolve the tenancy, but leaves each to sell his share; while in cases of partnership in trade, unless under particular circumstances of the trade, the rule is different.

Sir *Samuel Romilly*, in reply.—If on the death of Mr. Hall his interest in the trade devolved to his widow by survivorship, his executors have no interest, and the second suit is improperly instituted by them. But the objection is untenable. The codicil of the late Mr. Crawshay withdrawing the trade from the operation of the residuary clause in his will, disposes of three-eighths in favour of Mr. Hall alone, to the exclusion of his wife.

The objection that the children are not parties to the first suit is equally unfounded. They have no fixed interest, Mr. Hall's will contains only a contingent bequest in favour of a child who shall attain twenty-one. The motion, however, is made in both causes, and the persons interested under that will are therefore before the Court.

It is clear that the property consists not of a mere joint interest in the land, but of a partnership in trade. The business includes the manufacture of ore purchased from strangers, and is such as subjects the parties to the bankrupt laws. Mr. Crawshay, the testator, described it as a trade. He gives not an interest in leasehold property, but a share in a trade, of the capital of which that leasehold property forms a part. The expression, "so long as the lease endures," assigns no definite period. Among the several subsisting leases, to which is the Court to refer those words? The testator evidently employed them only to denote the intention of passing his whole interest in this stock-in-trade. It is absurd to impute to him the design of imposing on his legatees the obligation of receiving as partners the representatives of such of them as died or became insolvent; a creditor, for example, taking out administration. On that construction, under the bankruptcy of one, his assignees, being competent to sell his interest, might introduce the purchaser as a new partner during the continuance of the leases.

The order sought is in strict conformity with practice. The Court, more especially where infants are concerned, takes immediate measures to terminate a trading, which is in effect conducted with the property of others.

Lord Chancellor *Eldon*.—The object of this motion is a sale of the partnership property; and in whatever terms expressed, the Court, if it directs a sale, will so direct it, that the property may be sold in the manner most beneficial for all parties interested. Where a suit is instituted for the dissolution of a partnership, and where it is clear on the bill and answer that all or some of the parties have a right to a dissolution, it is not contrary to the course of practice to direct a sale on motion. The two modes of proceeding for obtaining an immediate order for a sale, either to set down the cause for hearing on bill and answer, or to apply by motion, are the same in effect, though different in form. The reason of that practice is, that *if one partner has a right to consider the partnership as at an end, it may continue for the purpose of winding up the affairs; but being by death, or notice, or any other mode of determination, actually ended, no person in possession of the property can make any use of it inconsistent with that purpose.* If any person conducts it otherwise, the Court will appoint a manager to wind up the concern, and will direct inquiries in what manner it can be wound up most beneficially to those interested. The object of this motion, therefore, might be obtained, notwithstanding the objection of

form ; and the difficulty with regard to parties might also be remedied by allowing the case to stand over for the bill to be amended ; and the question is to be considered on the part of Mr. Crawshay, as if the infant children of Mr. Hall had applied for a declaration that the partnership is not dissolved.

The general rules of partnership are well settled. *Where no term is expressly limited for its duration, and there is nothing in the contract to fix it, the partnership may be terminated at a moment's notice by either party.* By that notice the partnership is dissolved to this extent, that the Court will compel the parties to act as partners, in a partnership existing only for the purpose of winding up the affairs.

So *death terminates a partnership*, and notice is no more than notice of the fact that death has terminated it. Without doubt in the absence of express, there may be an implied, contract, as to the duration of a partnership ; but I must contradict all authority, if I say that wherever there is a partnership, the purchase of a leasehold interest, of longer or shorter duration, is a circumstance from which it is to be inferred that the partnership shall continue as long as the lease. On that argument the Court, holding that a lease for seven years is proof of partnership for seven years, and a lease of fourteen of a partnership for fourteen years, must hold that if partners purchase a fee simple, there shall be a partnership for ever. It has been repeatedly decided, that interests in lands purchased for the purpose of carrying on trade are no more than stock-in-trade. I remember a case in the House of Lords about three years ago (the case of the Carron Company) in which the question was much discussed, whether, when partners purchase freehold estate for the purpose of trade, on dissolution that estate must not be considered as personalty with regard to the representatives of a deceased partner ? (See 1 Lead. Cas. Eq. 155.)

The doctrine that death or notice ends a partnership has been called unreasonable. It is not necessary to examine that opinion, but much remains to be considered before it can be approved. If men will enter into a partnership, as into a marriage, for better and worse, they must abide by it ; but if they enter into it without saying how long it shall endure, they are understood to take that course in the expectation that circumstances may arise in which a dissolution will be the only means of saving them from ruin ; and considering what persons death might introduce into the partnership, unless it works a dissolution, there is strong reason for

saying that such should be its effect. Is the surviving partner to receive into the partnership, at all hazards, the executor or administrator of the deceased, his next of kin, or possibly a creditor taking administration, or whoever claims by representation or assignment from his representative?

If Mr. Crawshay, the testator and owner of this property, had thought proper, by his will, to declare that his legatees should continue the partnership as long as the longest of the leases should endure, no person, I agree, claiming under that will, could enjoy the benefits conferred by it, without submitting to the inconveniences which it imposed; but I find nothing to that effect in his will. It might have been plausibly, though I think not effectually, contended, that Bailey and Hall were bound to continue partners as long as they lived; but the words cannot be represented as imperative on any other person. The difficulty on the part of those who insist that the partnership is to continue as long as the leases, is this, that they cannot insist that it is to continue between the original partners and their representatives; for they have admitted, and must admit, that each partner might assign his interest, and assign it to any number of individuals, in any number of shares; so that in truth the partnership, within two years after its formation, might not contain either an original partner, or a representative of any one of the original partners; but might consist entirely of a multitude of assignees.

In another view of this question it becomes important accurately to know the nature of the business. It seems difficult to establish that this is an interest in land distinct from a partnership in trade—a mere interest in land, in which a partition could take place; for when persons having purchased such an interest, manufacture and bring to market the produce of the land, as one common fund, to be sold for their common benefit, it may be contended that they have entered into an agreement, which gives to that interest the nature, and subjects it to the doctrines, of a partnership in trade. Such is my present view; but both on the merits and on the objections of form the case deserves further consideration.

June 27.

Lord Chancellor *Eldon*.—It may be assumed, though the observation is not material to the purposes of this application, that the desire of Mr. Crawshay, the testator, was to keep the concern together. He gives a sum of £25,000 to Mr. Bailey, as a capital for

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him to become a partner with his executor, Mr. Hall; the rest of his interest in the trade, if he had not made a codicil, would have passed by the will to Hall and his wife. The effect of the will and codicil combined is this,—by the former, the testator being possessed of the entire concern, bequeathed two-eighths to Bailey, the rest, including the three-eighths given by the codicil to William Crawshaw, would have devolved under the residuary clause to Hall and his wife; the codicil, continuing the gift of two-eighths to Bailey, disposes of three-eighths to William Crawshaw, and of the remaining three-eighths to Hall, in exclusion, as I understand, of his wife. Such being the state of the concern at the death of the testator, it appears that Bailey sold his share to William Crawshaw, and it has not been disputed in the course of the discussion, that every one of the legatees was at liberty to sell his interest; the consequence is, that the individuals forming the partnership may be changed as often as the partners think proper. The question on these pleadings is, whether supposing this the hearing of the cause, the Court could order the property to be sold; and whether the nature of the concern, and of the interest of the several parties in it, is not such that, each being at liberty to sell his own share, they yet cannot, more particularly by interlocutory application, call on the Court for a sale of the whole? Mr. Crawshaw, having bought the interest of Mr. Bailey, carried on the business jointly with Mr. Hall till the death of the latter. His will seems to me to devolve on his executors the discretion of continuing or discontinuing this concern, as they should think most for the benefit of his family; and he considers himself at liberty (for the will states as much) to introduce three executors as partners with Mr. Crawshaw, and various branches of his family as *cestuis que trust* of those executors, as they must be, if the partnership is continued. It is impossible to contend that Mr. Hall may thus impose on Mr. Crawshaw the necessity of continuing in partnership with his three executors, and their *cestuis que trust*, without admitting that on the same principle he might have imposed the obligation of receiving as partner any person who might now sustain, or hereafter acquire, the character of executor or administrator to any of the trustees, or of their *cestuis que trust*, and that Mr. Crawshaw might have exercised a similar power. If this case is to be considered subject to the principles which govern partnerships in general, I cannot say that such was the situation of either party.

On the death of Mr. Hall, there being no articles of partnership

or agreement for its continuance, without any notice, and for every purpose except that of winding up the concern, the partnership would cease, unless the surviving partner, and the representatives of the deceased, entered into some agreement for its continuance: and in the absence of articles or stipulations to the contrary, Crawshay, in the life of Hall or Hall in the life of Crawshay, might, on the common principles of the contract, by notice have terminated the partnership. It is contended, that the late Mr. Crawshay, having formed this business, must have had an intention to keep it together as one concern, though he distributed different interests in it among different members of his family; had he so said, without doubt those who took his bounty must have taken it on the terms which he imposed; but there is no such expression in his will or codicil, nor is the effect of those instruments more than to give an interest in aliquot shares and proportions in this concern. He has said, indeed, that Bailey should have an interest to the amount of £25,000 and should be partner with his executor; but neither the terms nor the intent of the will impose on Bailey or on his executor an obligation to carry on the partnership, except as between themselves; and if Bailey thought proper to sell to Crawshay his interest, a question might have arisen, as long as the executor was living, whether Crawshay, purchasing the interest of Bailey, did not purchase subject to the obligation which, it is said, this will imposes on Bailey; but it seems to me impossible to contend, that when the executor was dead, either Crawshay or Bailey were bound to carry on the trade with the executors of that executor, a proposition which cannot be maintained without asserting that they were bound to carry on the trade with the successive executors of that executor, to the expiration of the leases.

It has also been insisted that the purchase of leases must be considered as evidence of a contract for the continuance of the concern. Unquestionably partners may so purchase leasehold interests as to imply an agreement to continue the partnership as long as the leases endure; but it is equally certain that *there is no general rule, that partners purchasing a leasehold interest must be understood to have entered into a contract of partnership commensurate with the duration of the leases.* For ordinary purposes a lease is no more than stock in trade, and, as part of the stock, may be sold; nor would it be material that the estate purchased by a partnership was freehold, if intended only as an article of stock; though a question might in that case arise on the death of a partner, whether it would

pass as real estate, or as stock, personal estate in enjoyment, though freehold in nature and quality. It is impossible therefore in my opinion to hold, that there being many leases,—some long, some of short duration, and others intermediate,—the partnership is to subsist during the term of the leases or the longest lease. By the will of Mr. Hall, the question, whether his executors and trustees should continue in partnership, is left to their discretion; clear evidence of his opinion, that his interest might be separated from Crawshay's; if so, Crawshay's might be separated from his; and upon that construction of the will of the late Mr. Crawshay, the argument is, that he meant the whole concern to be kept together, but cared not who were to be the partners; an intention not to be imputed to him unless unequivocally expressed in the words of his will.

The question then resolves itself into this, what is the nature of this partnership property? *The general doctrine with respect to a trading partnership is, that where there is no agreement for its continuance, any one of the partners may terminate it;* and admitting the serious inconveniences which sometimes ensue, it becomes us to recollect the formidable evils which would attend the opposite doctrine; nor is it clear that a better rule could be suggested: but, whatever is its policy, the principle of law being established, it is incumbent on those who engage in partnership to protect themselves by contract against its inconveniences; if they omit that precaution, courts of justice have no right to redeem them from the penalties of their imprudence.

With respect to mere joint-interests in land, I apprehend the rule to be different; the parties then becoming tenants in common, each cannot call on his companions to concur in a sale, but must sell his own interest. It is said that this is only the case of tenancy in common of a mine; if so I think that the doctrine with respect to land would apply, and not the doctrine with respect to trading partnerships; but a very difficult question may arise whether, if the parties, being originally tenants in common of a mine, agree to become jointly interested in the manufacture of its produce for the purpose of sale, they continue mere tenants in common of the mine; still more, if not only carrying the produce of their own mine to market, they become purchasers of other property of a like nature, to be manufactured with their own. On such a case in bankruptcy, it might be a question whether they were purchasers for the mere purpose of better bringing to market the produce of their own mine, or for the purpose also of bringing a distinct subject to market as

traders. On the evidence before me the case is left somewhat doubtful, though I think that the language of Mr. Hall's will, and of all the instruments, describes this as a trading concern ; but under the circumstances it will not be wrong to have the nature of the business explained by affidavit. If this is a trading partnership, the common principles must be applied.

Then comes the question, can the Court, in such a case, direct a sale by interlocutory order on motion? I have considered that question much, and *I think that the Court not only can, but in many instances does, order a sale on motion, in the instance of a trading partnership actually dissolved.* Consider the inconveniences of a contrary proceeding. By the hypothesis, the Court has before it the case of a trading partnership clearly dissolved, and nothing remains, therefore, but to wind up the concern ; we must then weigh the consequences of permitting the business of a partnership actually dissolved, to proceed until a decree for a sale ; a decree which, in those circumstances, must necessarily be pronounced. An universal rule, that the trade, whether beneficial or not, should be carried on till the decree, would render the jurisdiction of the Court in many cases extremely mischievous ; and on general principles, therefore, it is the practice, in the instance of a trading partnership clearly dissolved, at once to put an end to the trade, where that measure is required by the evident interest of the parties.

I shall reserve my final decision till I have seen the affidavit ; and it may be worth consideration, whether you will not, in the meantime, bring before the Court the posthumous child of Mr. Hall.

The affidavit of Mr. Crawshay, in explanation of the nature of the business, was to the following effect :—That the ironworks at Cyfarthfa had, from the period of their first establishment by his father, been conducted as a trading concern ; that the produce of the mines consisted of ironstone, coal, and limestone, and that at the works large quantities of iron (of various specified descriptions) had been and were manufactured, sometimes from the materials obtained from the leasehold premises in question, and sometimes from pig-iron and finers' metal purchased in London, Plymouth, and Bristol ; that from the establishment of the works, the proprietors had been in the habit of making very considerable purchases of iron-ore from Lancashire, pig-iron, and finers' metal, and of old wrought-iron, naval and ordnance stores, for the purpose of manufacturing

the same at the works into various sorts of iron, and reselling them in that manufactured state; that such purchases (to a large amount), manufacture, and resale, had been made by the successive firms of Crawshay, Hall and Bailey, and Crawshay and Hall, during those respective partnerships; that the whole of such purchases were made with a view to profit, by manufacturing the same at the works, into bar and other iron for resale, and not merely for mixing the same with the iron the produce of the works, for the purpose of improving the iron of the works, or bringing the same better to market; and that from the first establishment of the works, the ironstone, coal, and limestone, produced from the mines on the works, had never been sold in their natural or raw state, except a small quantity of coal for the accommodation of the labourers.

July 23.

Lord Chancellor *Eldon*.—This application, whether granted or refused, is one of the most important with which I have lately had to deal. The motion is made in two causes, to neither of which is the widow of Mr. Hall a party. The first bill prays a declaration that the partnership is dissolved; the object of the second is to compel its continuance, omitting to advert to a fact which, in any view of the case, seems clear, that Crawshay could not be constrained to remain a partner, but had the same right to dispose of his interest which was exercised by Mr. Hall over his own. I am perfectly satisfied that the relief sought by that bill cannot be given, that is, that the executors of Mr. Hall cannot bind Crawshay to them; whether he can compel dissolution, is quite another question. Mr. Hall having by his will disposed of his own share, and attempted to introduce new partners, there is obviously no equity to constrain these parties to continue in partnership, unless it arises from express or implied contract or from directions in the will under which they all claim. In that will I find no such direction. It is calculated only to render Bailey a partner in the trade, but imposes no conditions on Crawshay. On that point, however, it may be sufficient to say, that had any such conditions been imposed, yet when the interests of Baily and Crawshay became united in one person, and the executor was dead, having made such a will as appears in these pleadings, it would be impossible to maintain that an obligation existed among the parties to continue in partnership during the remainder of the leases.

I am also of opinion that, if this is to be considered as a partner-

ship in trade, the utmost that can be made from the purchase of leases of longer or shorter duration, is to propose that as a circumstance of evidence, from which may be inferred an implied contract that the partnership should last as long as those leases; but I find nothing here to authorize the conclusion that such was the intention. The purchase of a lease by a partnership is no more than the purchase of an article of stock, which when the partnership is dissolved must be sold. I lay aside the affidavit as to the nature of the undertaking, because there is sufficient in the wills of Crawshay and of Hall, to call on the plaintiffs in the second cause to show that this was not a trading partnership, if they meant to insist on that proposition. At present, I think that this was a trade.

The next question is, what is the consequence of Mrs. Hall not being a party? It is said that the effect of Crawshay's codicil is not such as to deprive Mrs. Hall of her interest under the will. That argument, if correct, might raise a question somewhat difficult; for considering the nature of the property, including freehold, leasehold, and personal chattels, and the power of Mr. Hall, as her husband, over her interest in many parts of that property, by reducing them into possession, unless we hold that the codicil deprived her of all the benefit which the residuary clause in the will conferred, it would not be easy to know what is become of her interest. Mr. Hall has taken on himself by his will to dispose of this property, and has given to his wife a provision which would put her to election, if she retains any interest in it; and should she elect to take against the will, it requires consideration, that she is not a party. The infant also is not before the Court; and some difficulty may arise from acting in their absence. On the other hand, it is impossible to call on Crawshay to continue a partner with the executors of Hall, and to say that, whether they are considered as having the legal estate only or as trustees for the family of Hall, Crawshay is obliged to unite himself with them as a trustee carrying on the trade for the benefit of their *cestuis que trust*; or that he has not at this moment the same right which Hall by his will supposed his executors would have at his death, and his eldest son at twenty-one.

That brings it again to the question, whether this is a partnership in trade or a tenancy in common in land; and if a partnership in trade, whether the ordinary rule of the Court is, on dissolution by the death of a partner, to wait till a decree before disposing of the partnership property, if the concern is of such a nature that

it cannot be wound up at once? I consider it clear, that the general rule is not to wait for a decree; but at least if the parties differ as to the mode of carrying on the trade, the Court will, without reference to the objection for want of parties, appoint a manager. Whether they will give notice of a motion for that purpose, which they shall be at liberty to do, or call on the Court for its opinion, and a reference to the Master to state the best mode of winding up the concern, is what the parties will determine.

Mr. Crawshay says, what I think is not unreasonable, that he will not carry on the trade five-eighths for himself, and three-eighths for the benefit of others. I desire to be understood as not deciding against ordering a sale, if Mrs. Hall and the infant were before the Court. If Mr. Crawshay will not carry on the trade, it is for the benefit of all parties interested, absent as well as present, that a manager should be appointed; and it is clear that the Court possesses the power of making the order on motion, without waiting for a decree.

July 31.

Lord Chancellor *Eldon*.—The first question that remains to be considered is, whether Mrs. Hall has any interest in this fund? How does that stand in the opinion of other persons? First, Mr. Hall disposed of the whole interest by his will; and his executors have filed a bill on the supposition that she had no interest; next, if the codicil had not the effect which I imagine on the will, the nature of the property renders it extremely improbable that Mrs. Hall should retain any interest; lastly, I think the codicil a revocation of the will, so far as concerns the trade. The question follows, is it clear that the partnership was dissolved by the death of Hall, or am I to say that his executors, or any of them, are partners at this day in this concern? After repeated consideration I entertain no doubt, either that if this is to be regarded as a trading concern, the partnership was ended by his death, or that it was a trading concern; the consequence is, that being a trading concern, and the partnership being terminated by Hall's death, Crawshay would be justified in dealing with the property, since that event, as a person who is to wind up the concern: that introduces the question, whether I am to place a manager on the estate, or to leave Crawshay to deal with the property as surviving partner? In that character he is at liberty to deal with it for the purpose of winding up the concern; it is true that other parties are at liberty to deal

with it in the same way, and in the event of differences between them, the Court can only appoint a manager to act under its direction. If application was made for a manager, it would be the duty of the Court, with regard to the infants, to consider whether that appointment is for their benefit, or whether there should be a reference to inquire the expediency of appointing a manager to wind up the business, or ordering a sale. The state of the market varies so much, that a sale, which might be beneficial at one moment and prejudicial at another, cannot be ordered without inquiry. I think that I shall not do wrong in directing a reference to the Master of the vacation to inquire whether it is for the advantage of all parties that this property should be sold, and, if so, on what terms, without prejudice to any question.

“His Lordship doth order, that it be referred to Mr. Courtenay, the Master of the vacation, to inquire and state to the Court, whether it will be for the benefit of all parties concerned in the works, that the same should be sold, and in what manner, as going works, or that they should be carried on for the purpose merely of winding up the concern; and for the purpose of making such inquiries, the parties are to be examined upon interrogatories, if the Master should so think fit, and to produce all books, papers, and writings relating to the said works, the production of which the said Master may think it proper to require; and it is ordered, that the said Master do proceed *de die in diem*.” 31 July, 1818. Reg. Lib. A. 1817, fol. 1760.

By his Report, dated 11th December, 1818, the Master, after stating that it was admitted that it would be highly injurious to all parties interested, to stop the works, or to carry them on merely for the purpose of winding up the concern, or to put them up to sale otherwise than as going works, and that William Crawshay had offered to purchase the whole of Mr. Hall's share for £90,000, certified that it would be for the benefit of the infants, and of all other parties concerned in the works, that the whole of the shares and interests in the said leasehold and other estates, etc., vested in the executors of Mr. Hall, should be sold to Mr. Crawshay at that price. By an order of the Vice-Chancellor, on the petition of Mr. Crawshay, the Report was confirmed, and it was “ordered, that the defendants, G. Maule, J. Llewellyn, and J. Kaye, as executors of the said B. Hall, Esq., the testator in the pleadings named, be at

liberty to sell and dispose of, to the petitioner, by private contract, at the sum of £90,000, ascertained and apportioned as in the said Report specified, all the estate, shares, right, and interest of them the said defendants, as such executors as aforesaid, of and in the said iron-works, and the said late co-partnership of Crawshay and Hall, and in the leases, farms, lands, and buildings, wharf, machinery, etc." 24th December, 1818. Reg. Lib. A. 1818, fol. 204.

WATERS v. TAYLOR.

November 4, December 24, 1818.

[REPORTED 2 VES. & BEA. 299.]

Partnership in the Opera House, dissolved by the conduct of the parties making it impossible to carry it on upon the terms stipulated.

Decree accordingly for a sale of the whole concern; restraining the managing partner from acting, with liberty to either party to lay proposals before the Master for management until the sale.

This cause¹ coming on to be heard, the plaintiff, who claimed as executor of Mr. Gould, who was entitled by assignment from the defendant, Mr. Taylor, in 1803, to seven-sixteenth parts of the Italian Opera House, and as mortgagee of the remaining shares, which continued to be the property of Taylor, by his bill prayed a decree of foreclosure of the mortgage, a dissolution of the partnership, an account of the transactions, and particularly the receipts and payments, of the defendant Taylor, an injunction restraining him from receiving any part of the income, and interfering in the concerns of the Opera House, and a direction to the Master to consider of a scheme for the sale of the joint property or for the future management. The defendant, Taylor, by his answer claiming as a creditor upon the result of the account, insisted on a lien upon the plaintiff's share for the balance, that should appear to be due.

¹ See the case stated in the Report upon the motion, 15 Ves. 10.

Sir *Arthur Piggott*, Mr. *Fonblanque*, Mr. *Hart*, and Mr. *Johnson*, for the plaintiff. Mr. *Richards*, Sir *Samuel Romilly*, Mr. *Leach*, Mr. *Wetherell*, and Mr. *Shadwell*, for the defendant, Taylor.

For the plaintiff it was insisted, that if he was entitled to a decree, dissolving the partnership, the Court in directing the future management was not bound to the particular stipulations of the contract; but would consult the benefit of the parties.

Upon the question as to the dissolution of the partnership, *Sayer v. Bennett* (1 Cox, 107) and *Adams v. Liardet* (from a MS. of Sir Samuel Romilly, before Lord Thurlow) were cited. In the former, upon the insanity of a partner, an inquiry was directed, whether he was in such a state of mind as to be capable of conducting the business, but the result does not appear.

The Lord Chancellor (Lord *Eldon*) in the course of the argument inquired, how the sheriff executes the writ under a judgment against one partner, according to the present doctrine of courts of law, that he takes the interest of the partner; and in some way (it is not very clear how) they take an account of all the concerns; and the creditor sells the interest of the partner. Is not that a dissolution of the partnership?

Mr. *Cooke* (*amicus curiæ*) said, the way in which the sheriff executes the writ in practice, is by making a bill of sale of the actual interest. *Scott v. Scholey*, 8 East, 467.

Lord Chancellor *Eldon*.—If the courts of law have followed courts of equity in giving execution against partnership effects, I desire to have it understood, that they do not appear to me to adhere to the principle, when they suppose that the interest can be sold, before it has been ascertained what is the subject of sale and purchase. According to the old law (16 Vin. Ab. 242, 243, etc.), I mean before Lord *Mansfield's* time, the sheriff under an execution against partnership effects took the undivided share of the debtor, without reference to the partnership account; but a court of equity would have set that right by taking the account, and ascertaining what the sheriff ought to have sold; the courts of law, however, have now repeatedly laid down (*Barhurst v. Clinkard*, 1 Show. 173; *Eddie v. Davidson*, Doug. 650), that they will sell the actual interest of the partner, professing to execute the equities between the parties; but forgetting, that a court of equity ascertained previously what was to be sold. How could a court of law ascertain what was the interest to be sold, and what the equities; depending upon an account of all the concerns of the partners for years?

By the express contract of these parties, which is the basis of this concern, whether a partnership, or to be described by any other denomination, Taylor was manager, subject to all the engagements to which Gould had been subject. Whether this is a partnership, which might be dissolved by filing the bill (which it is perhaps difficult to maintain), or for a term of years, or, as was contended in the case of the theatre on the other side of the Haymarket (*Morris v. Colman*), without limits, as long as renewals could be obtained, is not extremely material in the view the Court is obliged to take of this case.

The case alleged is : that all these engagements have been violated from day to day ; that performers have been employed without mutual consent ; that this has been the habit, and may be persevered in : so, as to the nightly receipt of the money, which, it is represented, being either left in a particular place, or paid to an agent, has in some way got to the disposition of Taylor ; and the attempt of this Court to put an end to that has been rendered ineffectual by a slip in the terms of the injunction—a circumstance which I cannot regard, as the effect is, that the parties were under no prohibition. There is hardly one covenant which has not been violated. It is said the remedy is by repeated actions of covenant, and it is supposed that juries may have feelings of vengeance that may subject Mr. Taylor to such damages as may produce the full object of the plaintiff ; but a court of equity has power to restrain and enjoin,—a power in many instances recognized by the law, as resting on that very circumstance, that without such interposition the party can do nothing but repeatedly resort to law ; and when that has proceeded to such an extent as to become vexatious, for that very reason the jurisdiction of a court of equity attaches.

It was supposed, that I had contradicted Lord *Kenyon's* doctrine in *Sayer v. Bennett* (1 Cox, 107). Certainly I did not contradict that doctrine, nor did I make any decree which, duly considered, was an assent to it. The case was no more than this : one partner becoming a lunatic, the others thought proper by their own act to put an end to the partnership, which they had no right to do, if he had been sane ; and they continued to carry on the business with his capital, not being able to state what was his as a creditor and what was not his as a partner. That Lord *Kenyon* thought afforded a sufficient ground for saying the partnership was not determined ; and he also held, that one partner cannot on account of the lunacy of another put an end to the partnership, but that object must be attained through the decree of a court of equity.

My decision was not intended either to support or impeach that ; proceeding upon the particular circumstances of the case before me. The question whether lunacy is to be considered a dissolution, is not before me (*Huddleson's case*, cited 2 Ves. 34) ; I shall therefore say no more upon it than this. If a case had arisen, in which it was clearly established, as far as human testimony can establish, that the party was what is called an incurable lunatic, and he had by the articles contracted to be always actively engaged in the partnership, and it was therefore as clear as human testimony can make it that he could not perform his contract, there could be no damages for the breach in consequence of the act of God : but it would be very difficult for a court of equity to hold one man to his contract, when it was perfectly clear that the other could not execute his part of it. It will be quite time enough to determine that case when it shall arise ; for as we know that no lunacy can be pronounced incurable, yet the duration of the disorder may be long or short, and the degree may admit of great variety, I would not therefore lay down any general rule by anticipation, speculating upon such circumstances. I agree with Lord *Thurlow*, that the jurisdiction is most difficult and delicate, and to be exercised with great caution.

The real question here is quite different from *Adams v. Liardet*, which I take to be that in which Lord *Thurlow's* opinion was expressed. This question is, whether from the acts of Taylor himself it is not manifest, that this partnership cannot be carried on upon the terms for which the parties engaged : whether a single act has been done by him of late, that is not evidence, on his part, that he can no longer himself be bound by his contract, so as to observe the terms of it ; when he excludes himself from the concern and the partnership, as far as it is to be conducted upon the terms on which it was formed, and says he will carry it on upon other terms. Taking that to be his conduct, this comes to the common case of one partner excluding the other from the concern ; as, if one will not, because he cannot, continue it upon the terms on which it was formed, the consequence must be, that he says his partner shall not, because he cannot, carry it on upon those terms.

That is the true amount of this case. The one cannot engage a performer without the other's consent ; having entered into stipulations only with reference to agreement, they have given me no means of extricating them from the difficulties arising from non-agreement. Suppose an opera at this time requires more than

£300 per week, or a new exhibition more than £500, if the plaintiff differs upon that, what is a Judge to do but to look at the contract, as the only thing the Court can act upon : and if both parties agree that the contract cannot be acted on, that furnishes the means of saying there is an end of it, and their interests are to be regarded as if no such contract had existed. The parties by consent determine that there is an end of the concern, which cannot be carried on upon the terms stipulated ; and the Court cannot substitute another contract.

In this view of the case, my opinion is that this contract is determined, and the parties must be treated accordingly (*Baring v. Dix*, 1 Cox, 213). The decree as to the mortgage, etc., is of course, but another view of the case arises from the answer of Taylor claiming as a creditor upon the accounts, and that the Court, regarding this as partnership property, shall give him a lien upon the plaintiff's share for the balance that may be due on the account. Upon the same principle then, if the plaintiff shall appear to be a creditor, has not he a right to have Taylor's share sold ? and then is the Court, winding up the concern, to sell the share of one, and not the whole joint property ? Each has an interest to have the whole sold, which will sell much better than the shares, especially if unliquidated.

The most difficult question is that as to the appointment of a manager in the interval between the decree and the sale. This joint concern ought to be brought to sale, if at all, upon the principles I have mentioned ; placing them in the state in which they would be, if without any stipulation for management they were respectively owners of given undivided shares, they agree upon given principles and prescribed terms for the management, which can no longer be carried on upon those principles and terms, and the question is, whether the Court can impose a manager before the sale, not upon the prescribed terms, but on such as may be advisable for all the parties concerned. With an inclination, that I shall have great difficulty to make that a part of the decree, without some previous inquiry, I reserve for further consideration that difficulty and material question, having expressed my opinion upon the rest of the case ; in a word, that these parties have themselves dissolved this joint concern, as their conduct shows that they cannot carry it on upon the terms stipulated.

December 24.—The minutes, as corrected by the Lord Chancellor

declared, that the defendant Taylor was not entitled to act as manager until a sale; and that if the Master's opinion should be, that the property could not be immediately sold, either party was to be at liberty to lay proposals before him for the management until a sale.

Crawshay v. Maule and Waters v. Taylor are printed together, because they are generally cited as leading cases on the law relating to partnership, more especially whenever the question arises as to what amounts to, or is a sufficient reason for a court of equity to decree, a dissolution of partnership, and as to the important results therefrom, both to the partners themselves or to third parties connected with the partnership. These topics it is proposed to consider somewhat in detail in this note, so far as relates to ordinary private partnerships only.

Before doing so, however, it may be remarked, although it is usual for partners to regulate the terms upon which they agree to associate in any business by articles of partnership, yet that a private unincorporated partnership does not require to be evidenced by writing, and it may be entered into by a mere parol engagement, or be inferred from the acts of the parties. *Peacock v. Peacock*, 16 Ves. 49. See also *Norton v. Seymour*, 3 C. B. 792; *Smith v. Sherwood*, 10 Jur. 214; *Beech v. Eyre*, 5 Man. & Gr. 415; 6 Scott, N. R. 327; *Heyhoe v. Burge*, 9 C. B. 431.

We may also notice the different

classes of partners. They may be (1) *Ostensible* partners, or those who really are and appear to the world as partners. (2) *Nominal* partners, or those who, though they have no interest in the firm, appear and are held out to the world as partners. (3) *Dormant* partners, or those who are not known to the world as partners, and do not intermeddle with the partnership affairs; but who, as they share in the profits, are liable to third parties.

Having made these preliminary remarks, it is proposed to consider:

1. What constitutes a partnership.
2. Partnership as to third persons.
3. The rights and interests of partners in the partnership property.
4. The liabilities of partners.
5. The rights, duties, and obligations of partners between themselves.
6. The remedies of partners as between themselves.
7. The rights of partners against third parties.
8. The dissolution of partnership, when and how it may be effected.
9. The effects and consequences of a dissolution.

1. *What constitutes a Partnership.*—Partnership may be defined to be a voluntary contract, whereby two or more competent persons put, or contract to put, something

in common, whether it be money, effects, labour, and skill, or some or all of them, for some *lawful* purpose or business, in order that there may be a communion of profits arising therefrom between or amongst them. Coll. Partn. 2; Stor. Partn. § 2; Pothier, Partn. by Tudor, p. 2.

It is worth while to examine carefully this definition of the contract of partnership, for it will be seen hereafter to have a most important bearing upon many questions which arise, both between partners themselves and others.

First of all, partnership is said to be a *voluntary* contract, and herein it is clearly distinguishable from those cases in which a community of interest may exist, independently of contract or the will of the parties interested. Persons, for instance, who by deed, will, or gift *inter vivos*, become entitled to property, either as tenants in common or joint tenants, although they enjoy a community of interests, are not partners but part-owners. So if two or more persons purchase goods for the mere purpose of division, and not for the purpose of selling and dividing the profits, although there is a community of interest between them, it is not a partnership. *Hoare v. Dawes*, Doug. 371; *Coope v. Eyre*, 1 H. Black. 37; *Gibson v. Lupton*, 9 Bing. 297.

So likewise, although there is a community of interest between the representatives of a deceased partner and the surviving partners, there is not, independently of

contract, any partnership between them. *Pearce v. Chamberlain*, 2 Ves. 33.

Upon the same principle, where persons engage to do some particular work, and receive money for it, not on a joint account or for their joint benefit, but to be divisible between them on receipt; the contracting parties, it seems, will not be partners but joint contractors. *Finckle v. Stacy*, Sel. Ch. Ca. 9. See the remarks of *Wigram, V. C.*, 7, Hare, 174.

In the contract of partnership, moreover, which is founded upon the *delectus personæ*, no third party can be introduced, as a partner in the firm, without the consent of *all* the persons comprising it, although such third person might, without the consent of the rest, become a partner with an individual member of the firm in his share; for it has long since been established that a man may become a partner with A. when A. and B. are partners, and yet not be a member of that partnership which existed between A. and B. See *Ex parte Barrow*, 2 Rose, 255; *Sir Charles Raymond's* case, cited 2 Rose, 255; *Bray v. Fromont*, 6 Madd. 5; *Goddard v. Hodges*, 1 Crompt. & Mees. 33; 3 Tyr. 209.

Upon this ground, as was laid down in the principal case of *Crawshay v. Maule*, a surviving partner cannot, in the absence of a stipulation to that effect, be compelled to receive into the partnership the representatives of a deceased partner (*Pearce v. Chamberlain*, 2 Ves. 33; *Godfrey v.*

Browning, ib. 34, cited). So strictly was this principle adhered to in the Roman law, that even a *stipulation* for the admission of the heir of the deceased into the partnership was void. "*Adeo morte socii solvitur societas, ut nec ab initio pacisci possimus, ut hæres succedat societati.*" Dig. lib. 17, t. 2, l. 59; and see Dig. lib. 17, t. 2, l. 35; Dig. lib. 17, t. 2, l. 52, s. 9; Dig. lib. 17, t. 2, l. 65, s. 11; Dig. lib. 17, t. 2, l. 70.

The law of England, however, very rightly does not restrain persons entering into a contract for a partnership, from *expressly stipulating* that upon the death of any of them, any person or class of persons may be introduced into the partnership (*Stuart v. Earl of Bute*, 3 Ves. 212; 11 Ves. 657; 1 Dow, 73; *Balmain v. Shore*, 9 Ves. 500; and see *Warner v. Cunningham*, 3 Dow, 76; *Simmons v. Leonard*, 3 Hare, 581; *Page v. Cox*, 10 Hare, 163); but such stipulation must be clear, otherwise the onus of showing the existence of a partnership, in order to render any such person or class of persons liable, will lie upon the surviving partners. *Tatam v. Williams*, 3 Hare, 347, 356.

The option reserved to the executors of a deceased partner to enter into the partnership with a surviving partner must be accompanied by the obligation on the part of the surviving partner to admit them; and unless the option be confined to the representatives of the partner who shall die first, the surviving partner must have

the option of entering into the partnership with the representatives of the deceased partner, with the same accompanying obligation on their part to admit him. *Downs v. Collins*, 6 Hare, 418, 436.

With regard to the question, who are *competent* persons to enter into partnership, it may be observed that all persons *sui juris* may do so. Even in the case of an *infant*, his contract to become a partner is not void, but only voidable, as it may be for his benefit; and if, after attaining his majority, he either expressly intimates his desire to remain a partner, or does so impliedly, by not repudiating the contract within a reasonable time, he will be considered to have affirmed it, and his liability as a partner will attach. *Holmes v. Blogg*, 8 Taunt. 35, 508; *Baylis v. Dineley*, 3 Mau. & Selw. 477; *Goode v. Harrison*, 5 B. & Ald. 147, 156; and see *Keane v. Boycott*, 2 H. Black. 511, 514, 515.

An alien friend may undoubtedly contract a partnership in this country, but an alien enemy, or a person domiciled in an enemy's country, cannot do so, indeed, as we shall hereafter see, a war breaking out between the countries of two partners, of itself effectually dissolves the partnership. See *McConnell v. Hector*, 3 B. & P. 113; *Albretcht v. Sussmann*, 2 V. & B. 323; *O'Mealey v. Wilson*, 1 Camp. 482, and the cases in the note thereto.

At common law a married woman is disabled from entering into the contract of partnership (*Cosio*

v. *De Bernales*, Ry. & Moo. 102; 1 Carr. & P. 266, *ante*, p. 229). She may however do so under a special custom, as by the custom of London (*Beard v. Webb*, 2 Bos. & Pull. 93),—upon the civil death of her husband in consequence of profession or abjuration (*Beard v. Webb*, 2 Bos. & Pull. 93, 105; *Lean v. Schutz*, 2 Wm. Bl. 1199), upon the suspension of his marital rights by transportation for a term of years (*Sparrow v. Carruthers*, cited 2 Wm. Bl. 1197; 1 T. R. 6, 7; 1 Bos. & Pull. 359; *Carrol v. Blencow*, 4 Esp. 27; *Marsh v. Hutchinson*, 2 Bos. & Pull. 231), or, in case the husband be a foreigner, if he has never come within the realm. *De Gaillon v. L'Aigle*, 1 Bos. & Pull. 357; *Kay v. Duchesse de Pienne*, 3 Camp. 123.

In equity if a woman is possessed of separate property, she may, it is conceived, enter into a contract of partnership so as to bind such property, although it would not be binding as against herself personally. See *Hulme v. Tenant*, 1 Leading Cas. Eq. 2nd ed. 394 and note.

So likewise a married woman, after a judicial separation from her husband under the Divorce and Matrimonial Causes Act, 20 & 21 Vict. c. 85, can, it is presumed, as long as the separation continues, enter into the contract of partnership. See Sect. 26; Macqueen on Div. and Matrim. Jurisdict. 63.

It is essential to the contract of partnership that each of the partners should put or contract to put something into the partnership;

either money, effects, labour, or skill. But it is not necessary that what each of the contracting parties puts or contracts to put into the partnership should be of the same nature. If one brings, or promises to bring, money or goods, it is not necessary that the other should in like manner bring the same; and it is sufficient that he should contribute his labour and industry. See Poth. Partnership, by Tudor, p. 6; *Peacock v. Peacock*, 16 Ves. 49; *Reid v. Hollinshead*, 4 B. & C. 878. The Roman law was the same, according to which it is said "*Societatem uno pecuniam conferente, alio operam posse contrahi magis obtinuit.*" L. i. Cod. Pro. Soc., Cod. 4, tit. 37, l. 1.

If there be any stipulation with regard to the property in the capital stock, either express or implied, such stipulation will of course be binding upon the partners. *Ex parte Owen*, 4 De G. & Sm. 351.

If there be no such stipulation, and no implication from the circumstances of the particular case leading to a different conclusion, there will be presumed to be a community of interest in the property as well as in the profit and loss. Stor. Partn. § 27; *Baxter v. Newman*, 8 Scott, N. R. 1019; *Farrar v. Beswick*, 1 Mood. & Rob. 527.

A partnership may exist in the capital stock, although the whole price is in the first instance advanced by one party, the other contributing his time and skill and security in the selection and purchase of the stock. Thus in *Reid*

v. *Hollinshead*, 4 B. & C. 867, A., a merchant in London, by letter directed B., a broker in Liverpool, to purchase 1000 bales of cotton, and stated that B. was to be allowed to be one-third interested therein, acting in the business free of commission. B. agreed to purchase the cotton, and to hold one-third interest therein, charging no commission. B. purchased the cotton, and in the subsequent correspondence, which continued for upwards of three months, the transaction was referred to as a joint account, joint concern, joint purchase, joint speculation, joint cotton adventure. B. transmitted policies of insurance against loss by fire to A. and stated that the cotton was deposited in rooms rented by him (B.), and that he held the key for their joint security. It was held by the Court of King's Bench that B. was interested as a partner in the cotton, and consequently that a pledge of the whole by him, without any fraud or collusion on the part of the pawnee, gave the pawnee a right to hold the goods against A.

An agreement by a person purchasing goods that another shall be interested in a certain proportion of the profits and loss of their sale, will not give the latter any property in the goods. Thus in *Smith v. Watson*, 2 B. & C. 401, an agreement was entered into between A., a merchant, and B., a broker, that the latter should purchase goods for the former, and in lieu of brokerage should receive for his trouble a certain propor-

tion of the profits arising from the sale, and should bear a proportion of the losses. It was held by the Court of King's Bench that B. was not entitled to any share in the property so purchased, or in the proceeds of it, although the agreement might render him liable as a partner to third persons. "A right to share in the profits of a particular adventure," said *Bayley, J.*, "may have the effect of rendering a person liable to third persons as a partner, in respect of transactions arising out of the particular adventure in the profits of which he is to participate; but it does not give him any interest in the property itself, which was the subject-matter of the adventure." See also *Meyer v. Sharpe*, 5 Taunt. 74; *Hesketh v. Blanchard*, 4 East, 144; *Ex parte Hamper*, 17 Ves. 404; *Mair v. Glennie*, 4 Mau. & Selw. 240.

It is often a very important question to ascertain whether a partner has a property in the capital stock, for if he has he can pledge it (*Reid v. Hollinshead*, 4 B. & C. 867); whereas if he has an interest only in the profits he has not such power, and if he is a mere part-owner he can of course only pledge his own share.

A partnership must moreover be constituted for some lawful purpose. Thus if it be for an immoral object, as for the keeping of a house of ill-fame (Poth. Partn. by Tudor, p. 11), or a gambling-house (*Watson v. Fletcher*, 7 Gratt. 1), or if it be in contravention of an act of parliament (*Gordon v. Howden*, 12 C. & F. 237; and see *Arm-*

strong v. Lewis, 2 Crompt. & Mees. 274; 3 My. & K. 53), it will be void.

Another thing essential to the formation of the contract of partnership, at any rate as between the parties themselves, is that there should be a communion of the profits arising therefrom between the parties to the contract, which ordinarily implies a communion of loss. *Dry v. Boswell*, 1 Campb. 329. But any partner may enter into a stipulation with his co-partners, that he shall be free from loss, and that will be binding as between him and them (*Fereday v. Hornderne*, Jac. 144; *Gilpin v. Enderbey*, 5 B. & Ald. 954; *Bond v. Pittard*, 3 M. & W. 357; *Reade v. Bentley*, 4 K. & J. 663); though his liability to strangers will not be thereby affected. *Waugh v. Carter*, 2 H. Bl. 235; 1 Smith's L. Cas. 726.

Although it is clear where there is a community of interest in the capital stock and also a community of profits, that there exists a partnership between the parties themselves (*Ex parte Gellar*, 1 Rose, 297; *Rawlinson v. Clarke*, 15 M. & W. 292), it is not essential to constitute a partnership even between the parties themselves that there should be a communion of interest in the capital stock. For although the whole capital stock is contributed by one party and by contract is to remain his property exclusively, nevertheless if there is between them a community of profit or of profit and loss, they will be partners both as regards themselves individually and with

regard to third parties. *Ex parte Hamper*, 17 Ves. 404.

In the absence of any express stipulation, or evidence showing the intention of the parties, partners will participate equally in the profits and losses of the concern. See *Peacock v. Peacock*, 16 Ves. 49, in which case a father having taken his son into partnership without any express stipulation as to the share he was to have in the concern, upon an issue directed by Lord *Eldon*, which was tried before Lord *Ellenborough*, the jury held the son entitled to a fourth of the profits (2 Campb. 45). On the case coming back to Lord *Eldon*, it was unnecessary for him to decide the question, as the parties considered themselves bound by the verdict, but he made the following comments in disapproval of it:—"The father," said his Lordship, "employed his son in his business; and, as is frequently done by a father, meaning to introduce his son, the business was carried on in the name of '*Peacock and Co.*' It appeared to me that the son, insisting that he had a beneficial interest, must be entitled to an equal moiety, or to nothing; that as no distinct share was ascertained by force of any express contract between them, they must of necessity be equal partners, if partners in anything. In that view, the result of the issue that was directed appears to be extraordinary. The proposition being that the son was interested in some share, not exceeding a moiety, the jury, in some way upon the foot-

ing of *quantum meruit*, held him entitled to a quarter. I have no conception how that principle can be applied to a partnership." In *Farrar v. Beswick*, 1 Mood. & Rob. 527, Mr. Justice Parke held the same opinion as Lord Eldon; as did also Lord Cottingham in *Stewart v. Forbes*, 1 Mac. & G. 146; and Sir J. Wigram, V.C., in *Webster v. Bray*, 7 Hare 159, 179. There the question to be decided was in what shares two persons who had accepted the office of solicitors to a railway company were entitled in the emoluments, when they had made no arrangement as to the division of the business or the emoluments of the office, and a much larger portion of the work was done by the defendant than the plaintiff. Sir James Wigram, V.C., said, "In the absence of previous arrangement between the parties, the remuneration to be paid to either for personal labour exceeding that contributed by the other, must be left to the honour of the other; that where that principle was wanting, a court of justice could not supply it, and that equality in the division of the profits would be the rule." See also *Robinson v. Anderson*, 20 Beav. 98; 7 De G. Mac. & G. 239.

The law of Scotland, however, differs from that of England upon the point now in discussion, for it has been held by the House of Lords that where there is no express contract between partners, it is not according to the law of Scotland a necessary presumption of law that the profits are to be

divided in equal shares. But it is a question for a jury, upon evidence of all the circumstances, such as goodwill, skill, capital, and labour, what the proportion of interest in the loss and profit should be. *Thompson v. Williamson*, 7 Bligh, n.s. 432.

Although the contract of partnership itself does not determine in what proportion the partners are to participate in the profits of the business, it may be inferred from their dealings, as, for instance, from the entries in the partnership books, so as to rebut the ordinary presumption of equality. See *Stewart v. Forbes*, 1 Mac. & G. 137, where Lord Cottenham, C., said, "The Plaintiff puts this case in his bill, and his argument rests upon the supposition, that from 1830 to 1840 Sir Charles Forbes and the Plaintiff were equal partners; and *Peacock v. Peacock* was relied on as a foundation for that assumption. In that case it was properly held, that in the *absence of any contract* between the parties, or any dealings from which a contract might be inferred, it would be assumed that the parties had carried on their business on terms of an equal partnership. That case has no application to the present, because there is in this case conclusive evidence, not from any form of contract, but from the books of the business and the dealings between the parties, that such were not the terms on which the parties carried on their business. An equal partnership implies not only an equal participation *de facto* in the profits and loss, but a right

in each partner to claim and insist on such participation. But what would have been the decision in *Peacock v. Peacock*, if the books and accounts, instead of absolute silence as to the shares of the partners in each year, had described the shares in which the partners were entitled in the business, and had attributed to the plaintiff four-sixteenths only of the shares of the business? These entries are as conclusive of the rights of the parties as if they had been found prescribed in a regular contract."

An important question may be raised, when the whole of the capital belongs to one partner, or he has advanced a larger amount of capital than he was bound to do according to the partnership contract, whether, in the absence of any stipulation, he shall be allowed any interest for such capital beyond his share in the profits.

Although perhaps it is not altogether free from doubt, it seems, in the absence of any stipulation, or of usage, such as the manner of making out the accounts from which a stipulation may be implied, interest will not be allowed to a partner for any excess of capital employed in the business; this no doubt is a hard case where both partners are equally laborious and equally attentive to the business. 6 Beav. 440.

But interest would clearly be given if the Court can collect, from the circumstances or from the usage between the parties, that there ought to be, or was intended

to be, such computation of interest. *Millar v. Craig*, 6 Beav. 433, 440, 441, 442.

2. *Partnership as to third Persons*.—As we have before observed, a person may be a partner, although he has no community in the partnership stock, if he is entitled to a share of the profits. But where he has a share in the profits, he may not be a partner so far as the firm is concerned, if it was intended that he should be a mere agent or clerk, although he may nevertheless be considered a partner so far as third parties are concerned. A difficulty often arises in ascertaining whether a contract for the payment of a salary dependent on the amount of the profits of a concern makes the recipient a partner or a mere agent. The cases upon this subject, in which very refined distinctions are taken, are ably reviewed in 1 Smith's Leading Cas. 740, 4th ed., and the learned author comes to the conclusion (see p. 745) that whenever it appears that the agreement was intended by the partners themselves as one of *agency or service*, and the agent or servant is to be remunerated by a *portion of the profits*, then the contract would be considered as between themselves one of *agency*, (*Geddes v. Wallace*, 2 Bligh, 270; *R. v. Hartley*, Russ. & Ry. 139); but as between them and third persons as one of *partnership*. *Smith v. Watson*, 2 B. & C. 407; *Ex Parte Rowlandson*, 1 Rose, 91; *Green v. Beasley*, 2 Bing. N. C. 110; *Ex parte Langdale*, 18 Ves.

800. If however the agent or servant is to be remunerated not by a portion of the profits, but by part of a *gross fund or stock which is not altogether composed of the profits*, the contract even as against *third persons* will be one of agency, although that fund or stock may include the profits, so that its value, and the quantum of the agent's reward, will necessarily fluctuate with their fluctuation (*Dry v. Boswell*, 1 Campb. 329, 330; *Cheap v. Cramond*, 4 B. & Ald. 663, 670; *Waugh v. Carver*, 2 H. Bl. 235, 246, 247; *Saville v. Robertson*, 4 T. R. 720; *Bond v. Pittard*, 3 M. & W. 357; *Pearson v. Skelton*, 1 M. & W. 504); and it seems that where the agent or servant is not to receive a part of the profits *in specie*, but a sum of money calculated in proportion to a given quantum of the profits, he will not be a partner even as to third persons, *Ex parte Hamper*, 17 Ves. 404, 412; *Ex parte Watson*, 19 Ves. 461; and see *Grace v. Smith*, 2 Wm. Black. 998; *Pott v. Eyton*, 3 C. B. 32; *Barry v. Nesham*, 3 C. B. 641; *Withington v. Herring*, 3 M. & P. 30; *Stocker v. Brockelbank*, 3 Mac. & Gord. 250.

The option to become a partner and receive a share of the profits of a concern, even from a time past, is not of itself alone, and while it remains unexercised, sufficient to make the person having such option a partner. *Gabriel v. Evill*, 9 Mees. & W. 297; *Car. & M.* 358; *Ex parte Turquand*, 2 M. D. & D. 340; *Wilson v. Whitehead*, 10 Mees. & W. 503.

A person receiving interest or an annuity, fixed as to amount and duration, for money lent to a firm, is not a partner, because he has no mutuality in the profits with the firm (*Grace v. Smith*, 2 Sir W. Black. 998); but if he received an annuity out of (*Bond v. Pittard*, 3 M. & W. 357, 361; *Ex parte Wheeler*, Buck. 25; *Ex parte Chuck*, 8 Bing. 469; *Ex parte Hamper*, 17 Ves. 404, 412) or in lieu of the profits of a trade, or determinable on the cessation of the trade (*Bloxham v. Pell*, 2 Wm. Black. 999), or an annuity (*Young v. Axtell*, cited 2 H. Black. 242; *Ex parte Wheeler*, Buck. 25), or a rate of interest (*Ex parte Chuck*, 8 Bing. 469), although it be contingent (*Ex parte Wilson*, Buck. 48), fluctuating with the rate of the profits, he will be considered to be a partner. See Coll. Part. 26-29; Stor. Part. § 30-§ 70.

The reason given why in these cases, when it is held there is a community of profits, the person receiving a salary, an annuity, or interest, is considered to be a partner, is, that by taking a part of the profits he takes from the creditors a part of the fund which is their proper security for payment to them of their debts. *Waugh v. Carver*, 2 H. Black. 235; *Barry v. Nesham*, 16 L. J. C. P. 21. And it is upon this ground that a *dormant* partner, that is to say, one who, without being known to third parties as a partner, receives a share of the profits of a firm, is liable for its engagements. *Robinson v. Wilkinson*, 3 Price, 538;

Winter v. Crowther, 1 Cr. & Jerv. 316.

If a person allow his name to be used in a business, or in any way hold himself out to the world as a partner in a firm he will, as regards third parties, be equally liable as if he were actually one. *Ex parte Watson*, 19 Ves. 459, 461; *Fox v. Clifton*, 6 Bing. 776; *Parker v. Barker*, 1 Brod. & Bing. 9; *Goode v. Harrison*, 5 B. & Ald. 147; *Bond v. Pittard*, 3 Mees. & W. 357; *Bonfield v. Smith*, 12 Mees. & W. 405; *Waugh v. Carver*, 2 H. Black. 235; *Young v. Axtell*, ib. cited 242; *Gurney v. Evans*, 3 Hurlst. & N. 122; *Baird v. Planque*, 1 F. & F. 344.

3. *The Rights and Interests of Partners in the Partnership Property.*—Assuming that partners have a community in the partnership property, the question next arises, What, in the absence of special stipulations which will of course be binding as between them (*Garbett v. Veale*, 5 Q. B., 408; *Johnson v. Evans*, 7 M. & G. 240; *Mayhew v. Herriott*, 7 C. B. 229; *Baxter v. Brown*, 7 M. & G. 198; 8 Scott, N. R. 1019), is the interest of each therein.

Partners are joint-owners of the partnership property, and their interest therein differs from that both of ordinary joint-tenants and tenants in common. In the first place, because a partner may, for partnership purposes and in the partnership name, dispose of the whole of the partnership property, consisting of mere personalty.

(*Ante*, p. 266.) Whereas a mere tenant in common or joint-tenant can only dispose of his own undivided share. Stor. Part. § 89.

It also differs from a joint-tenancy, inasmuch as like a tenancy in common, the interest of a partner in the partnership stock and effects does not go to the surviving partner, but to the representatives of the deceased partner. This is in accordance with the well-known rule, "Inter mercatores pro beneficio commercii jus accrescendi locum non habet." *Bone v. Pollard*, 24 Beav. 283.

In the case of real property belonging to a firm, although at law the surviving partners would be deemed either joint-tenants or tenants in common, according to the construction which ought to be put upon the conveyance, in equity, the legal owners will be held trustees for the partnership, and will consequently hold the share of a deceased partner in trust for his representatives. *Lake v. Craddock*, 3 P. Wm. 158; S.C. 1 Lead. Cas. Eq. 145; *Morris v. Barrett*, 3 Y. & J. 384; *Jackson v. Jackson*, 9 Ves. 591. Indeed, in many cases real property held for partnership purposes is in equity treated as mere personalty. And although the cases may, at first sight, seem to be conflicting, the result of them appears to be, that in the absence of any agreement, and except for the purposes of paying the probate duty (*Custance v. Bradshaw*, 4 Hare, 315), real estate purchased with partnership capital for the purposes of partnership in trade

will in equity be converted into personality. *Townshend v. Devaynes*, 1 Mont. on Partn. Append. 97; *Rop. H. & W. Jac. Ed.* p. 846; *Selkraig v. Davies*, 2 Dow, 281; *Phillips v. Phillips*, 1 My. & K. 649; *Broom v. Broom*, 3 My. & K. 443; *Morris v. Kearsley*, 2 Y. & C. Exch. Ca. 140; *Bligh v. Brent*, ib. 268; *Houghton v. Houghton*, 11 Sim. 491. But where real estate belonged to the partners when they entered into partnership, or has been subsequently acquired by them out of their own private moneys, or by gift, although it is used for partnership purposes in trade (*Thornton v. Dixon*, 3 Bro. C.C. 199; *Balmain v. Shore*, 9 Ves. 500; *Cookson v. Cookson*, 8 Sim. 529; *Brown v. Oakshot*, 24 Beav. 254), or if, although paid for out of the partnership capital, it is not purchased for the purposes of partnership in trade (*Bell v. Phyn*, 7 Ves. 459; *Randall v. Randall*, 7 Sim. 271), it will, in the absence of any agreement or direction for its sale, which will of course be binding (*Ripley v. Waterworth*, 7 Ves. 425; *Thornton v. Dixon*, 3 Bro. C.C. 199; *Essex v. Essex*, 20 Beav. 442), retain the character of realty. See also 1 Lead. Cas. Eq. 155-164.

Each partner has moreover a specific lien on the partnership property, not only for his own share under the partnership, but also for moneys advanced by him for the use of the firm, and also for the moneys abstracted from the firm by any copartner beyond his share. *West v. Skip*, 1 Ves. 239;

Ex parte Ruffin, 6 Ves. Jun. 119. The share however of a partner can only be ascertained after payment of the debts of the firm. See note to *Ex parte Ruffin*, post, p. 346.

With regard to the goodwill of a partnership business, an interest of an outgoing partner in it may be valued. *Kennedy v. Lee*, 3 Mer. 441; *Farr v. Pearce*, 3 Madd. 74. And the estate of a deceased partner is entitled to participate in the goodwill of a business as it does not belong to the surviving partner except by express agreement. *Wedderburn v. Wedderburn*, 22 Beav. 84; sed vide *Lewis v. Langdon*, 7 Sim. 421. Upon a sale therefore of the entire partnership under a decree, the Court will order the sale to be adjusted so as to give full value to the goodwill. *Cook v. Collingridge*, Jac. 607; but where the articles of partnership, although they regulate how the partnership property is to be valued to the surviving or remaining partner, do not specify that any compensation is to be made for the goodwill, the retiring partner will not be allowed anything for his share in it. *Hall v. Hall*, 20 Beav. 139.

These remarks however are applicable only to the goodwill in a business of a commercial character. The goodwill of a business in a profession, such as that of a surgeon or solicitor, as it is not considered to have a local existence, but to depend upon purely personal qualifications, is not considered to be susceptible of valuation, and will therefore, in the ab-

sence of contract, go to the surviving partner. *Farr v. Pearce*, 3 Madd. 78; *Spicer v. James*, Coll. Partn. 104; *Austen v. Boys*, 24 Beav. 598; 4 Jur. n.s. 719.

4. *Liabilities of Partners.*—

One partner by virtue of the relation of partnership is constituted a general agent for another as to all matters within the scope of the partnership dealings, and has communicated to him by virtue of that relation all authorities necessary for carrying on the partnership, and all such as are usually exercised by partners in that business in which they are engaged. Any restriction which by agreement amongst the partners is attempted to be imposed upon the authority which one possesses as a general agent for the other, is operative only between the partners themselves, and does not limit the authority as to third persons who acquire rights by its exercise, unless they know that such restriction have been made. *Hawker v. Bourne*, 8 M. & W. 710. This is a good summary of the law on this branch of the subject, but for further information relating to it the reader is referred to the case of *Sandilands v. Marsh*, *ante*, p. 258, and note.

The liability of one partner for the acts and dealings of the others begins with the commencement of the partnership, and it is immaterial that the deed of partnership was not signed when the alleged liability occurred, if the parties had then acted as partners. *Battley*

v. Lewis, 1 Man. & Gr. 155; 1 Scott, N. R. 143. He is not liable for contracts made previous to the commencement of the partnership (*Catt v. Howard*, 3 Stark. 5; *Saville v. Robertson*, 4 T. R. 720; *Fox v. Clifton*, 6 Bing. 776), even although it may have been agreed by the partners among themselves that the partnership was to have a retrospective operation, so as to relate back previous to the creation of the alleged liability; "for although the retrospective date of the partnership may affect the account between the partners, it will not affect the rights of third persons." *Vere v. Ashby*, 10 B. & C. 288, 298; *Young v. Hunter*, 4 Taunt. 582; *Dickinson v. Valpy*, 10 B. & C. 142.

Nor is a person liable for goods furnished *while* he was a member of a firm under a contract made *before* he became one. *Whitehead v. Barron*, 2 M. & Rob. 248; *Beale v. Mouls*, 10 Q. B. 976.

If a person agree to become a partner at a future time with others, provided other persons agree to do the same, and advance stipulated portions of capital, or provided any other previous conditions are performed, he gives no authority at all to any other individual, until all those conditions are performed. If any of the other intended partners in the meantime enter into contracts, it seems to be clear that he is not bound by them, on the simple ground that he has not authorized them (always supposing that he has not held himself out, directly or indirectly, to the party

with whom the contracts are made, as having in substance given that authority). Per *Parke, J.*, in *Dickinson v. Valpy*, 10 B. & C. 142; see also *Howell v. Brodie*, 6 Bing. N. C. 44; *Hawken v. Bourne*, 8 M. & W. 703; *Gabriel v. Evill*, 9 M. & W. 297; *Barnett v. Lambert*, 15 M. & W. 489.

Another important question is, when does the liability of a person who has entered into a partnership cease with regard to third parties, for the acts of the firm?

In the case of an ostensible partner it is clear that after he has retired from the partnership, and given proper notice of the dissolution, although he will be liable for previous (*Wood v. Braddick*, 1 Taunt. 104; *Ault v. Goodrich*, 4 Russ. 480), he will not be liable for the subsequent (*Pinder v. Wilks*, 5 Taunt. 612; *Abel v. Sutton*, 3 Esp. 108; *Wrightson v. Pullan*, 1 Stark. 375; *Heath v. Sansom*, 4 B. & Ad. 177) contracts of his late partners.

If however he has not given proper notice he will be liable for all contracts made even after his retirement, for it is but just as he holds himself out to the world as being still a member of a firm that he should be responsible for its engagements. *Parkin v. Carruthers*, 3 Esp. 248; *Stables v. Eley*, 1 Car. & Payne, 614; *Graham v. Hope*, 1 Peake, 154.

With regard to what is proper notice, it seems that notice in 'The Gazette' of the dissolution of partnership is sufficient as against parties who have not previously dealt with the firm (*Godfrey v.*

Turnbull, 1 Esp. 371; *Wrightson v. Pullan*, 1 Stark. 375); but actual notice should be sent to those with whom the firm has had dealings (*Graham v. Hope*, 1 Peake, 154; *Kirwan v. Kirwan*, 2 C. & M. 617; 4 Tyr. 491); and this is generally done by means of a circular letter. *Newsome v. Coles*, 2 Campb. 617; *Jenkins v. Bizard*, 1 Stark. 418; *M'Iver v. Humble*, 16 East, 169; *Ex parte Burton*, 1 G. & J. 207; *Ex parte Leaf*, 1 Deac. 176.

Although notice may not have been expressly given, it will under certain circumstances be presumed. Thus where a change had taken place in names of the firm in the printed cheques of a banking-house, it was held that it was a sufficient notice to the customers of a change in the firm. *Barfoot v. Goodall*, 3 Campb. 147; *Hart v. Alexander*, 2 M. & W. 484.

Although a person may have given notice of his retirement from a firm, he will still continue liable if he permits his name to be used by his late partners, where, for instance, he allows his name to remain on the door of the house of business (*Williams v. Keats*, 2 Stark. 290; *Dolman v. Orchard*, 2 C. & P. 104; *Brown v. Leonard*, 2 Chit. 120); but he will not be liable if his name is used by his late partners without his authority. *Newsome v. Coles*, 2 Campb. 617.

A dormant partner is only chargeable with respect to the liabilities of the firm contracted when he was actually a partner, receiving the emoluments and pro-

fits of the business; and it is not necessary for him to give notice of his retirement (*Evans v. Drummond*, 4 Esp. 89, 90; *Heath v. Sansom*, 4 B. & Ad. 177; *Brooke v. Enderby*, 2 Brod. & Bing. 71) except to those who were aware of his being a partner; for unless notice of his retirement be given to such persons he will be liable for debts contracted by the firm after his retirement. *Farrar v. Deflinne*, 1 Car. & K. 580; *Evans v. Drummond*, 4 Esp. 89; *Heath v. Sansom*, 4 B. & Ad. 177; *Carter v. Whalley*, 1 B. & Ad. 11.

When a partnership is dissolved by the death of one of the partners, his personal representatives will not be liable at law for the contracts entered into by the firm when the deceased was a member of it, inasmuch as at law the liability survives, and a remedy only exists against the survivors. In equity however, as a partnership debt is several as well as joint, the estate of a deceased partner remains liable to the creditors of the firm, until the debts which affected him at the time of his death have been fully discharged. *Vulliamy v. Noble*, 8 Mer. 593; *Winter v. Innes*, 4 My. & Cr. 109.

It seems that where the surviving partner is bankrupt or insolvent, the joint creditors who take proceedings in equity will be postponed to separate creditors in their claims against the separate estate of the deceased partner. *Gray v. Chiswell*, 9 Ves 118; *Fisher v. Farrington*, Seton on Decrees, cited 1 My. & K. 583; *Ridgway v. Clare*, 19 Beav. 111, 116.

The joint creditors however of a deceased partner may in the first instance proceed in equity against his representatives in order to obtain satisfaction out of his estate, although it be not proved that the surviving partner is insolvent. See *Wilkinson v. Henderson*, 1 My. & K. 582. There the plaintiff was a creditor of a firm, and one of the members thereof having died, he filed a bill on behalf of himself and all other joint creditors against the executors of the deceased partner, and against the surviving partner, and it prayed payment of the partnership debts out of the estate of the deceased partner. Sir J. Leach, M. R., held that the plaintiff was entitled to a decree for the benefit of himself and all other joint creditors. "All the authorities," said his Honour, "establish that in the consideration of a court of equity, a partnership debt is several as well as joint. The doubts upon the present question seem to have arisen from the general principle, that the joint estate is the first fund for the payment of the joint debts, and that, the joint estate vesting in the surviving partner, the joint creditor, upon equitable considerations, ought to resort to the surviving partner before he seeks satisfaction from the assets of the deceased partner. It is admitted that, if the surviving partner prove to be unable to pay the whole debt, the joint creditor may then obtain full satisfaction from the assets of the deceased partner. The real question, then, is whether the joint creditor shall be compelled to pursue the surviving partner

in the first instance, and shall not be permitted to resort to the assets of the deceased partner, until it is established that full satisfaction cannot be obtained from the surviving partner; or whether the joint creditor may, in the first instance, resort to the assets of the deceased partner, leaving it to the personal representatives of the deceased partner to take proper measures for recovering what, if anything, shall appear upon the partnership accounts to be due from the surviving partner to the estate of the deceased partner. Considering that the estate of the surviving partner is at all events liable to the full satisfaction of the creditors, and must, first or last, be answerable for the failure of the surviving partner; that no additional charge is thrown upon the assets of the deceased partner by the resort to them in the first instance, and that great inconvenience and expense might otherwise be occasioned to the joint creditors; and further, that according to the two decisions in *Sleech's* case in the cause of *Devaynes v. Noble* (1 Mer. 536), the creditor was permitted to charge the separate estate of the deceased partner, which in equity was not primarily liable, as between the partners, without first having resort to dividends which might be obtained by proof under the commission against the surviving partner, I am of opinion that the plaintiff is entitled in this case to a decree for the benefit of himself and all other joint creditors, for the

payment of his debt out of the assets of the deceased partner."

Courts of equity moreover will treat a joint security as several where it has been given for an antecedent partnership debt (*Burn v. Burn*, 3 Ves. 573; *Orr v. Chase*, 1 Mer. 729); but where an obligation executed by partners is purely a matter of arbitrary convention, growing out of no antecedent liability in all or any of the parties, its extent can only be measured by the words in which it is conceived, and a court of equity will not construe it differently from what a court of law would. *Sumner v. Powell*, 2 Mer. 30, 36, 37; and see *Wilmer v. Currey*, 2 De G. & Sm. 347. There a firm of three dissolved partnership, one of them retiring; and by the deed of dissolution, the two continuing partners covenanted for themselves, their heirs, executors, and administrators, that they or one of them would pay to the outgoing partner certain specified sums. It was held by Sir J. L. Knight Bruce, V. C., that this constituted only a joint liability at law, and could not be construed otherwise in equity, and a demurrer to a creditor's bill filed by the outgoing partner against the executrix of one of the covenantors, who died before the other, was allowed.

The claims, however, against a retired partner and the estate of a deceased partner, will be lessened by all payments made by his late companions, and all appropriations of payments subsequent to the dissolution of the partnership, in

satisfaction of the demands against the partnership. See *Clayton's case*, ante, p. 1; 1 Mer. 572; *Brooke v. Enderby*, 2 Brod. & Bing. 70; *Newmarch v. Clay*, 14 East, 239; *Toulmin v. Copland*, 3 Y. & C. Exch. Ca. 625; 1 West. App. Ca. 164; *Jones v. Maund*, 3 Y. & C. 347; *Pemberton v. Oakes*, 4 Russ. 154.

Upon the dissolution of a partnership, it is frequently agreed that the debts due to and from the firm shall be received and paid by the new firm, or one of the late partners. No arrangement, however, between the partners alone can vary the right of the creditors. The law, however, is now settled, that by the consent of *all* parties, the creditor, the old firm, and the new firm, or one of the late partners, the debts of the old firm may be transferred to the new firm, or one of the late partners. *Hart v. Alexander*, 2 Mees. & W. 493; *Kirwan v. Kirwan*, 2 C. & M. 617; 4 Tyr. 491; *Good v. Cheesman*, 2 B. & Ad. 328; *Cartwright v. Cooke*, 3 B. & Ad. 703.

It will be found that in some cases at law, even where it was clear that the creditor *intended* to take the separate security of the continuing partner, in lieu of the joint liability of the dissolved firm, the retired partner was held not to be discharged, as in *David v. Ellice* (5 B. & C. 196) and *Lodge v. Dicus* (3 B. & Ald. 611), in which a creditor, with a knowledge that the continuing partner had agreed to pay all the debts, took his personal security for the debt; but it was held, that he

had not thereby released the retired partner upon the ground of want of consideration for his so doing.

But these cases have been disapproved of by the subsequent authorities, and it seems now to be clear, that if a creditor of a firm agree with them to take, and does take the separate security, as, for instance the bill, of one partner in discharge of the joint debt, the other partner will be discharged. *Thompson v. Percival*, 3 Nev. & M. 167, 5 B. & Ad. 925; *Reed v. Winter*, 5 Esp. 122; *Evans v. Drummond*, 4 Esp. 89; *Kirwan v. Kirwan*, 2 C. & M. 617, 4 Tyr. 491; *Winter v. Innes*, 4 My. & Cr. 109. In *Lyth v. Ault*, 7 Exch. 669, it was held by the Court of Exchequer that the acceptance by one creditor of the sole and separate liability of one of two or more partners was a good consideration for an agreement to discharge all the other debtors from liability. "It is demonstrable," said *Alderson, B.*, "that the sole security of A. may be a better thing than the joint security of A. and B.; for by accepting the sole security of A., instead of the joint security of both debtors, the creditor possesses a legal remedy against A. during his lifetime, and against his assets after his death, and no security whatever against B. Now as to the case where the security is joint, after the death of A., there exists a legal liability of B., and no legal liability of A.'s assets; but an equitable remedy against the assets of A., subject to the neces-

sity of making B. a party to a suit in equity. Now these two securities are different things, and therefore a bargain to take the one for the other is good. Cases may be suggested of A. being rich and B. poor, in which the advantage of taking A. as the debtor in lieu of A. and B. is clear; or it may be that A. is as rich as B., in which case the creditor may fairly consider that one debtor alone is preferable to both together."

The acceptance however of the note of one of the partners as a collateral security (*Bedford v. Deakin*, 2 B. & Ald. 210) or the receipt of interest from him on the joint debt (*Gough v. Davies*, 4 Price, 200), will not be considered as conclusive evidence of the intention of a creditor to exchange the liability of the firm for that of a single partner.

The question whether such an agreement has been made, is one for the determination of a jury (*Thompson v. Percival*, 3 Nev. & Man. 167; 5 B. & Ad. 925; *Kirwan v. Kirwan*, 2 C. & M. 617; 4 Tyr. 491; *Hart v. Alexander*, 2 M. & W. 484; *Kemp v. Corington*, 28 L. T. 289); in short, as observed by Sir James Wigram, V.C., "where a partner retires from a firm, and a customer has notice of his retirement, and afterwards continues his dealing with the new firm, without making any claim on the retired partner, a jury may, from circumstances, presume that the customer agreed to discharge the retired partner, and to accept the new firm as debtors, instead of the old

one. In deciding whether such agreement ought to be presumed, the nature of the dealings subsequently to the retirement, the form of the accounts rendered, the time elapsed, and other circumstances may be most material." *Benson v. Hadfield*, 4 Hare, 37.

The cases at law upon this subject have necessarily arisen where the dissolution of the partnership has taken place by arrangement between the partners, and not by death. In equity, however, when the dissolution has taken place in consequence of the death of one of the partners, the claims against the estates of deceased partners will be regulated by the same principles, and an intention must appear, or an agreement be proved to release the estate of the deceased partner. Hence the estate of one of two partners will not, after his death, be discharged from a partnership debt by the circumstance that the creditor continues his transactions with the survivor, and forbears for some years, at the survivor's request, to take any steps to enforce payment of his debt.

But the result will be otherwise where the transactions show that the creditor has accepted the liability of the survivor in discharge of the liability of the partnership. *Winter v. Innes*, 4 My. & Cr. 101.

It may be here mentioned, that payment of a debt by one partner (*Innes v. Stephenson*, 1 M. & Rob. 145; *Cheap v. Oramond*, 4 B. & Ald. 663; *Ballam v. Price*, 2 Moore, 235; *Clarke v. Clement*, 6 T. R. 525; *Newton v. Blunt*, 3

C. B. 675), or a release or discharge to one partner (*Collins v. Prosser*, 1 B. & C. 682; *Nicholson v. Revill*, 4 Ad. & Ell. 675; *Cheetham v. Ward*, 1 B. & P. 630), will discharge the firm; but a mere covenant not to sue one partner will not release the rest. *Hutton v. Eyre*, Marsh. 608; *Thomas v. Courtney*, 1 B. & Ald. 8.

5. *Rights, Duties, and Obligations of Partners between themselves.*

—The contract of partnership, both in its inception and during its continuance, ought to be characterized by perfect good faith between the parties. “In societatis contractibus fides exuberet,” says the Code. Cod. Lib. 4, tit. 37, l. 3. Hence, if a person has been induced by fraudulent misrepresentation to enter into the contract of partnership, he may set it aside *ab initio*. *Colt v. Woollaston*, 2 P. Wms. 154; *Green v. Barrett*, 1 Sim. 45; *Rawlins v. Wickham*, 6 W. R. 509 (V.C.S.); 7 W. R. 145; (L. J.), 4 Jur. n. s. 990.

So if one partner obtains a renewal of a partnership lease in his own name, behind the backs of his copartners, he will be held a trustee of the renewed lease for the firm. *Featherstonhaugh v. Fenwick*, 17 Ves. 298, 311; *Alder v. Fouracre*, 3 Swanst. 489; *Clegg v. Edmonson*, 22 Beav. 125; *Clegg v. Fishwick*, 1 Mac. & G. 294. See also 1 Lead. Cas. Eq. 40.

So where partners enter into a contract, as, for instance, in making a purchase (*Carter v. Horne*, 1 Eq. Cas. Ab. Account Tit. pl. 13),

or in negotiating a new partnership (*Fawcett v. Whitehouse*, 1 Russ. & My. 132), one of them will not be allowed to derive any advantage by an underhand bargain for his own advantage. See also *Hichens v. Congreve*, 1 Russ & My. 150.

So where one of the partners undertakes clandestinely and for his own benefit, any business properly falling within the province of the firm and what it was his duty not to have undertaken on his own account, he will be compelled to share his profits with the firm (see *Russell v. Austwick*, 1 Sim. 52), for the principles of courts of equity will not permit that parties bound to each other by express or implied contract to promote an undertaking for the common benefit, should any of them engage in another concern which necessarily gives them a direct interest adverse to that undertaking. *Glassington v. Thwaites*, 1 S. & S. 124, 133.

Upon the same principle as it is the duty of a partner in sales and purchases to act for the best advantage of the firm, he will not be allowed to place himself in such a position as that his interests would conflict with his duty. Thus where two persons were partners in dealing in *lapis calaminaris*, and one of them, who was a shopkeeper, instead of purchasing it from the miners by cash payments, obtained it by way of barter for shop goods, it was held by Sir John Leach, V.C., that the partnership was entitled to an account and equal division of the profits made by such barter.

"The defendant," said his Honour, "here stood in a relation of trust or confidence towards the plaintiff, which made it his duty to purchase the *lapis calaminaris* at the lowest possible price; when in the place of purchasing the *lapis calaminaris* he obtained it by barter for his own shop goods, he had a bias against a fair discharge of his duty to the plaintiff. The more goods he gave in barter for the article purchased, the greater was the profit which he derived from the dealing in the store goods, and as this profit belonged to him individually, and as the saving by a low price of the article purchased, was to be equally divided between him and the plaintiff, he had plainly a bias against the due discharge of his trust or confidence towards the plaintiff." *Burton v. Wookey*, 6 Madd. 367; see also *Glassington v. Thwaites*, 1 S. & S. 124, 133.

Upon the same principle where one of several partners is employed to purchase goods for the firm, and he, unknown to his copartners, purchases goods of his own, though at the market price, he will be accountable to the firm for the profit he makes by the transaction. *Bentley v. Craven*, 18 Beav. 75; *Williams v. Trye*, ib. 366, 367.

The parties however to the contract of partnership may by express stipulation therein, take themselves out of the operation of the principle laid down in these cases. See *Black v. Mallalue*, 7 W. R. 303.

It is moreover the duty of a partner not to exclude another from the equal management of the

concern (*Rowe v. Wood*, 2 Jac. & W. 558), and they ought each to enter receipts in the partnership books, to keep precise accounts and to have them always ready for inspection, and in short to keep good faith towards each other. *Id.*; and see *Goodman v. Whitcomb*, 1 Jac. & W. 593; *Ex parte Yonge*, 3 V. & B. 37. "In the case of partnership," says Lord Eldon, "the Court acts upon this principle,—that the good faith of the partners is pledged mutually to each other, that the business shall be conducted with their actual, personal interposition, enabling each to see that the other is carrying it on for their mutual advantage, and not destroying it." See *Peacock v. Peacock*, 16 Ves. 51.

It is the duty also of a partner to devote a due amount of his time and his interest and skill in promoting the interests of the firm, nor can he, in the absence of any special stipulation, demand any reward or compensation for extraordinary expenditure either of time, labour, or skill. See *Thornton v. Proctor*, 1 Anst. 94; *The York and North Midland Railway Company v. Hudson*, 16 Beav. 485, 500. Even in the case of a surviving partner being executor carrying on the trade after the death of his copartner, he will not, without an express stipulation to that effect, be entitled to any allowance for his management and time, but only for his costs out of pocket. *Burden v. Burden*, 1 V. & B. 170.

Having observed what are the

duties of partners, resulting from the mere relation between them, independent of express stipulation, we may here remark, that where there are articles of partnership, it will be the duty of the partners to conform to them in all respects.

With regard to the construction placed upon provisions in articles of partnership, the reader is referred to the text-books on the subject of partnership. See Coll. Partn. p. 136, 2nd ed.; Story, § 187, 4th ed.; Bisset on Partn., p. 153.

Where the estate and effects of a debtor are assigned to trustees upon trust to carry on the business and divide the profits among the creditors of the assignor, a creditor signing the deed will be considered as a partner in the business, and will consequently become liable for the debts incurred by the trustees in carrying it on. *Hickman v. Cox*, 8 C. B. (N. S.) 523.

A departure from the provisions contained in articles of partnership, if it can be shown to be beneficial to infants interested therein, will be sanctioned by the Court of Chancery. *Martindale v. Martindale*, 1 Jur. (N. S.) 932.

As we have before observed, according to the law of England, no writing is necessary to constitute a private unincorporated partnership, the consent of the parties, or their dealings, from which a consent may be implied, being sufficient for that purpose (*Peacock v. Peacock*, 16 Ves. 49; *Featherstonhaugh v. Fenwick*, 17 Ves. 298; *Alderson v. Clay*, 1 Stark. 405); and when there is an agreement

in writing, it is by the unanimous concurrence of all the partners. open to variation from day to day, and the terms of such variations may not only be evidenced by writing, but also by the conduct of the parties in relation to the agreement and their mode of carrying on the business (*England v. Curling*, 8 Beav. 129, 133, 137; and see *Geddes v. Wallace*, 2 Bligh, 270, 295, 297); and special clauses in the partnership articles, for instance, as to the mode of taking accounts, will be considered as expunged from the articles, if the parties have not acted on them. *Jackson v. Sedgwick*, 1 Swanst. 460, 469.

If two partners take in a third partner, without specifying the terms on which he becomes such partner, he has the same rights and is subject to the same liabilities as the two original partners. The terms and conditions of the partnership which bind them will bind him, unless a new contract be made between them. *Austen v. Boys*, 24 Beav. 598, 606; 4 Jur. (N. S.) 719.

So also if the conditions of his becoming partner are partially set forth, then to the extent that they are not specified and involved by necessary inference therein, he will be bound by the terms of the partnership contract affecting the two original partners with whom he associates himself. *Ib.*

The mere fact that a lease being part of the subject-matter of the partnership has a particular duration, as was laid down in the prin-

capital case of *Crawshaw v. Maule* (*ante*, p. 291), will not, as a matter of course, create any implication as to the duration of the partnership, in the absence of any agreement express or implied. See also *Frost v. Moulton*, 21 Beav. 598.

Where one of several partners agrees with a stranger for a sub-partnership, it is not to be implied, in the absence of any agreement, that the duration of the sub-partnership is to be co-extensive with the original partnership. *Frost v. Moulton*, 21 Beav. 596; see also *Essex v. Essex*, 20 Beav. 442.

6. *Remedies of Partners as between themselves*.—With regard to the remedies of partners against each other, they are to be followed out either in courts of law or courts of equity.

It is a general rule, that between partners, whether they are so in general or for a particular transaction only, no account can be taken *at law* (*Bovill v. Hammond*, 6 B. & C. 149; *Holmes v. Higgins*, 1 B. & C. 74; *Brown v. Tapscott*, 6 M. & W. 119; *Wilson v. Curzon*, 15 M. & W. 532); nor can one partner maintain an action at law against the other partners, or any one or more of them, for moneys advanced or paid or contributed on account of the partnership. The reason given for this is that a court of law could not in such cases do *complete* justice, since the forms of an action would not permit it to enter on such an investigation of the entire state of the partnership accounts as would be

necessary in order to ascertain the fair and real claims of the contending parties." Smith's Merc. Law, 35, 6th ed.

Where however there is a covenant by deed or a special undertaking, not by deed, for the performance of a duty neglected, an action may be brought at law upon such covenant or undertaking. Smith's Merc. Law, 34, 6th ed.; and see *Brown v. Tapscott*, 6 M. & W. 119; *Want v. Reece*, 1 Bing. 18; *Bedford v. Brutton*, 1 Bing. N. C. 399.

A partner may also maintain an action against a copartner for money advanced to him *before* the partnership for the purposes of its formation (*Venning v. Leckie*, 13 East, 7; *Elgie v. Webster*, 5 M. & W. 518), for work done for the firm before he joined it (*Lucas v. Beach*, 1 M. & G. 417), or for a balance of an account after an account has been taken and a balance struck, either by the firm, the Court, or an arbitrator (*Moravia v. Levy*, 2 T. R. 483 n.; *Foster v. Allanson*, *ib.* 479; *Winter v. White*, 1 B. & B. 350; *Henley v. Soper*, 8 B. & C. 16; *Brown v. Tapscott*, 6 M. & W. 119; *Carr v. Smith*, 5 Q. B. 128); and an implied promise to pay is sufficient, an express promise, although formerly (*Fromont v. Coupland*, 2 Bing. 170; 9 B. M. 318), not being now considered requisite. *Rackstraw v. Imber*, Holt N. P. C. 368; *Wray v. Milestone*, 5 M. & W. 21.

So it seems that where a partner makes advances not to the concern but to another partner, in respect

of what he is to contribute to the joint capital, such advances, being altogether *dehors* the partnership, may be recovered back by the partner making them. *French v. Styling*, 2 C. B. (N. S.) 357-364.

Moreover, if any matter be withdrawn from the adjustment of partnership concerns, and made the subject of a distinct settlement, the general rule that one partner cannot sue another in respect of a partnership transaction till the whole partnership concerns are adjusted, will not apply. See *Jackson v. Stopherd*, 4 Tyrwh. 330; 2 C. & M. 361. There the plaintiff and defendant had worked a coal-pit in partnership till it was exhausted, when the plaintiff said he would join in no more coal-pits, and the defendant said he should work another, whether the plaintiff joined him or not. The materials and utensils belonging to the mine were valued, and each party was to take an article by turns, according to that valuation, till the whole was divided. The valuation was made; and it was subsequently agreed that the defendant should take the whole at the valuation, and he took possession of them. The other partnership debts and credits remained unsettled. It was held by the Court of Exchequer that this was a transaction so separate and distinct from the general accounts, that the plaintiff might sue for his moiety of the value of the materials and utensils before the final settlement of the partnership accounts. "Upon the general rule of law," said *Bayley*,

B., "there is no difficulty; it being clear that one partner cannot maintain an action against another on the partnership account till the accounts of the firm have been wound up, and the balance due from the partner to be sued to the partner making the claim is ascertained. But by special bargain between them, a particular transaction may be separated from the winding up of the general concern, and, when thus insulated, is taken out of the general law of partnership, constituting between the partners a separate and independent debt, on putting an end to their joint concern." See also *Coffee v. Brian*, 8 Bingh. 54; *Wray v. Milestone*, 5 M. & W. 21; *Elgie v. Webster*, 5 M. & W. 518.

Where after the dissolution one of the partners, by using the partnership name, renders the firm liable to a person not having notice of the dissolution, his copartner may maintain an action against him for the amount to which his liability extends. *Osborne v. Harper*, 5 East, 225; *Hutton v. Eyre*, 1 Marsh. 603; *Cross v. Cheshire*, 7 Exch. 43.

The remedies of partners in equity against each other are much more extensive in equity than at law. In the first place, a court of equity will decree the specific performance of a contract to enter into partnership for a fixed and definite term (*Anon.* 2 Ves. 629; *Buxton v. Lister*, 3 Atk. 385; *England v. Curling*, 8 Beav. 129); but it will not do so when no term has been fixed, for such de-

cree would be useless when either of the parties might dissolve the partnership immediately afterwards. *Hercy v. Birch*, 9 Ves. 357. It has, however, been suggested by Mr. Swanston, in his learned note to *Crawshaw v. Maule*, 1 Swanst. 518, that in many cases, although the partnership could be immediately dissolved, the performance of the agreement like the execution of a lease after the expiration of the term (see *Nesbitt v. Meyer*, 1 Swanst. 226) might be important, as investing the party with the legal rights for which he contracted.

Specific performance of a partnership contract for an absolute term of years, leaving undefined the amount of the capital, and the manner in which it is to be provided (the mode of carrying on the business being discretionary) cannot be enforced in a court of equity; and the Court being unable to enforce the entire contract, will not enforce it in part, as against the representatives of a deceased partner, by refusing them a decree for the dissolution of the partnership and the sale of the property, which may, under the contract, have been specifically devoted to partnership purposes. *Downs v. Collins*, 6 Hare, 418-437.

A court of equity will not decree specific performance of a covenant to refer disputes to arbitration (*Price v. Williams*, cited 6 Ves. 818; *Street v. Rigby*, 6 Ves. 815; *Wilks v. Davis*, 3 Mer. 507), and a plea of an agreement to refer to arbitration would not constitute a valid objection to a bill either for

discovery only or for discovery and relief (*Wellington v. Mackintosh*, 2 Atk. 569; *Street v. Rigby*, 6 Ves. 815; overruling *Halfhide v. Fenning*, 2 Bro. C. C. 336; but see and consider *The British Empire Shipping Company v. Somes*, 3 K. & J. 433), nor will the Court substitute the Master for the arbitrators. "For this," observed Sir John Leach, "would be to bind the parties contrary to their agreement." *Agar v. Macklew*, 2 S. & S. 418. It seems to be doubtful how far an action will lie at law for breach of such a covenant (*Kill v. Hollister*, 1 Wils. 129); or, at any rate, how other than nominal damages can be obtained. *Tattersall v. Groote*, 2 Bos. & Pull. 136. Covenants, however, to refer to arbitration may be made effectual. "There are," says Lord Eldon, "prudential ways of drawing them; as, for instance, there may be an agreement for liquidated damages, to enforce specific performance, if an action cannot produce sufficient damages, or equity will not entertain a bill for a specific performance." *Street v. Rigby*, 6 Ves. 818; and see *Astley v. Weldon*, 2 Bos. & Pull. 346.

So where one partner has, in breach of a covenant, carried on any trade on his own separate account, his copartner may file a bill in equity for an account of the profits, and he will be entitled to a due proportion thereof unless it be shown that he acquiesced in such breach. See *Somerville v. Mackay*, 16 Ves. 382, in which case it was held by Lord Eldon

that a special consent to one partner sending a small quantity of goods to a foreign country on his separate account, was not to be considered as a general acquiescence in an unlimited trade, contrary to the general obligations in the partnership contract.

Courts of equity moreover will take accounts between partners, nor is it essential, as it appears once to have been the opinion (*Forman v. Homfray*, 2 Ves. & B. 329; *Loscombe v. Russell*, 4 Sim. 10), that a dissolution should be at the same time sought, at all events in a case where one of the partners is misconducting himself by violation of the partnership contract. *Harrison v. Armitage*, 4 Madd. 143; *Richards v. Davies*, 2 Russ. & My. 347; *Wallworth v. Holt*, 4 My. & C. 619; *Richardson v. Hastings*, 7 Beav. 323; *Harvey v. Bignold*, 8 Beav. 343; *Deeks v. Stanhope*, 14 Sim. 57; *Fairthorne v. Weston*, 8 Hare, 387.

In examining hereafter when a court of equity will order a dissolution of partnership, the subject of taking accounts between partners on such an occasion will be more appropriately considered.

As a general rule, where a partner has committed such acts as would warrant a decree for a dissolution, the Court of Chancery will restrain the repetition thereof by injunction. Thus if a partner has been for his own purposes drawing, accepting, or indorsing bills of exchange (*Williams v. Bulkeley*, 2 Vern. 278 n. Raith. ed. Prec. Ch. 151; *Master v.*

Kirton, 3 Ves. 74; *Jervis v. White*, 7 Ves. 412; *Lawson v. Morgan*, 1 Price, 303; *Hood v. Aston*, 1 Russ. 412), has been using the property or resources of the partnership for a rival business (*Glassington v. Thwaites*, 1 Sim. & Stu. 124), or obstructing or interrupting the carrying on of the partnership business (*Charlton v. Poulter*, 1 Ves. Jun. 429, cited; 19 Ves. 148 n. Reg. Lib. 1752, A, fol. 78 b, 18 June, 1753), excluding his partner from the business (*Ib.*; and see *Hall v. Hall*, 12 Beav. 414), abstracting the partnership books contrary to an express covenant contained in the articles of partnership (*Taylor v. Davis*, 3 Beav. 388 n.; 4 L. J. (N. S.) 18 Ch.), a court of equity will restrain him by injunction. See also *Const v. Harris*, T. & R. 496.

The mere circumstance that a partner gives a partnership bill for his separate debt may, or may not, lay a ground for issuing an injunction against its negotiation; for the person who takes it may or may not have some reason for supposing that his debtor had a right or authority so to use the partnership name. But where it appears that an individual partner, indebted to the partnership, being unable to pay his separate bill, holden by his bankers, substitutes for it, by a negotiation with them, a partnership security, made and given without the consent or knowledge of his copartners, and the bankers are aware that it is so given without their consent or knowledge; that is a case which

comes within the principle upon which the Court of Chancery has always been in the habit of interfering by injunction. Per Lord *Eldon*, 1 Russ. 415; see *Hood v. Aston*, 1 Russ. 412; *Jervis v. White*, 7 Ves. 413.

It was however at one time thought that the Court. would never grant an injunction except upon such facts as, if proved at the hearing, would be a ground for a dissolution. There is however no such universal rule at the present day, and it is essential to justice that no such universal rule should be sustained, for if, for instance, a bill in no case would lie to compel a man to observe the covenants of a partnership deed, it is obvious that a person fraudulently inclined might of his mere will and pleasure compel his co-partner to submit to the alternative of dissolving a partnership, or ruin him by a continued violation of the partnership contract. See *Fairthorne v. Weston*, 3 Hare, 392; *Charlton v. Poulter*, 19 Ves. 148 n.; *Goodman v. Whitcomb*, 1 Jac. & W. 592.

It seems however that there is a reluctance on the part of the court of equity to grant an injunction against a partner unless there be a ground for a dissolution. Thus an injunction will not be granted to restrain the breach by a partner of a particular covenant, unless it be studied, intentional, and prolonged, and there be continued inattention to the application of one partner calling upon the other to observe the contract. *Marshall*

v. Colman, 2 Jac. & W. 266, 269.

After the dissolution of the partnership the Court of Chancery will restrain any of the former partners from doing any acts inconsistent with their duty of winding up the concern. Thus if any of the former partners still persist in carrying on the business for their own benefit, the Court of Chancery will restrain them by injunction. *De Tastet v. Bordenave*, Jac. 516; and see *Gold v. Canham*, 1 Ch. Ca. 311; 2 Swanst. 325.

Upon the same principle where a deceased partner having contracted in his own name for a lease of premises to be employed in the partnership trade, Lord *Eldon*, C., although he refused to restrain the lessor from granting a lease to the representatives of the deceased partner, nevertheless restrained the representatives from disposing of the lease when granted, except for partnership purposes, and with the assent of the surviving partner. *Alder v. Fouracre*, 3 Swanst. 489.

So likewise upon a motion made by the representatives of a deceased partner, an injunction has been granted against a surviving partner proceeding by ejectment to obtain possession of premises of which a joint lease had been made to himself and his deceased partner. *Elliot v. Brown*, 3 Swanst. 489 n.; see also *Hawkins v. Hawkins*, 4 Jur. (n. s.) 1045.

In proper cases, although generally with some reluctance, the Court of Chancery will appoint a receiver or manager of the part-

nership property, but to entitle a partner to an order for a receiver against his copartner, he must either show a dissolution, or facts which, if proved at the hearing, would entitle him to a decree for a dissolution. *Smith v. Jeyes*, 4 Beav. 503. Thus where one partner seeks to exclude another from taking any part in the partnership concern (1 Swanst. 481; *Blakeney v. Dufaur*, 15 Beav. 41) insists on a legal objection as destroying all right of his partner to a share in the partnership, as that he is a clerk in holy orders (*The Rev. John Hale v. George Hale*, 4 Beav. 360), a receiver will be appointed.

The reason why the Court of Chancery does not appoint a manager unless a dissolution is sought, appears to be this, that the Court only appoints a receiver or manager temporarily—that is, until the partnership affairs are wound up. *Ante*, p. 287, 297.

But partners, if they think fit, may by contract between themselves exclude the interference of the Court; and by express contract provide that on any particular event occurring, one party shall exclude the other, and so prevent the interference of the Court. *Blakeney v. Dufaur*, 15 Beav. 42.

Where however a dissolution is sought, or has already taken place, the Court of Chancery will appoint a receiver if there has been any breach of duty or of the partnership contract committed by one of the partners. Thus if one of the partners improperly takes possession and refuses to account for the

partnership effects (*Peacock v. Peacock*, 16 Ves. 49; *Milbank v. Revett*, 2 Mer. 405), or after a dissolution carries on trade with the partnership effects on his own account (*Harding v. Glover*, 18 Ves. 281), or excludes his copartner from the share to which he is entitled on the winding-up of the concern (*Wilson v. Greenwood*, 1 Swanst. 483; *Kershaw v. Matthews*, 2 Russ. 62), or persists in collecting the debts after having agreed upon the dissolution that they should be collected by a third party (*Davis v. Amer*, 3 Drew. 64), a receiver will be appointed.

So likewise where surviving partners insist on continuing the partnership business with the assets of a deceased partner, the representatives of the latter will be entitled to have a receiver appointed. *Madgwick v. Wimple*, 6 Beav. 495.

Where a *prima facie* case is made out for obtaining a decree for the dissolution of a partnership, the Court of Chancery will, upon an interlocutory application, appoint a receiver and manager until the hearing. *Marsden v. Kaye*, 30 L. T. 197.

The Court of Chancery however will not, upon a motion for a receiver of a partnership, determine the questions arising between the partners, the only object then being to protect the assets until the determination of the rights of the parties. *Blakeney v. Dufaur*, 15 Beav. 40.

Where all the partners are dead, and a suit is instituted by their representatives, a receiver will, as

a matter of course, be appointed; for "where there is a copartnership there is a confidence between the parties, and if one dies the confidence in the other partner remains, and he shall receive; but when both are dead, there is no confidence between the representatives, and therefore the Court will appoint a receiver." Per Lord Kenyon, M. R., in *Philips v. Atkinson*, 2 Bro. C. C. 272.

7. *Rights of Partners against third Parties.*—We may next consider what are the rights of partners against third parties. And first, as to the mode in which such rights may be acquired.

Where a person obtains an advance from another without ascertaining whether it is made by him on his own account, or on behalf of a firm of which he is a member, the debtor will become liable to the firm if the advance were made on its behalf. *Alexander v. Barker*, 2 Crompt. & J. 133; *Boswell v. Smith*, 4 Carr. & P. 60; *Sims v. Brittain*, 4 B. & Ad. 375; *Sims v. Bond*, 5 B. & Ad. 393; *Cooke v. Seeley*, 2 Exch. 746.

So where one of several partners either sells or buys goods for or on behalf of the partnership, the whole of the partners may sue the purchaser for the price, or the vendor for breach of his contract. *Skinner v. Stocks*, 4 B. & Ald. 437; *Rodwell v. Redge*, 1 Car. & P. 220; *Cothay v. Fennell*, 10 B. & C. 671.

But where the partners sue a person for goods supplied by the ostensible partner, he will be able

to set off against the demand a debt due from the ostensible partner. See *Stacey v. Decy*, 2 Esp. 469 n. There it appeared that the plaintiffs had entered into partnership as grocers; and it was agreed that Ross should keep the shop in his own name only. Under those circumstances he sold the defendant partnership goods for which the action was brought. The defendant had done business for the plaintiff Ross on his own account, and not on account of the partnership, to a greater amount than the demand now made against him by the partnership, and this he now offered to set off. This was opposed on the ground of the demand accruing in different capacities, and that so it was inadmissible. It was held however by Lord Kenyon, C. J., that the set-off was good. "The plaintiffs," said his Lordship, "had subjected themselves to it by holding out false colours to the world, by permitting Ross to appear as the sole owner. That it was possible the defendant would not have trusted Ross only if he had not considered the debt due to himself as a security against the counter-demand." See also S. C. 7 T. R. 361 n.; *George v. Claggett*, 7 T. R. 359; *Gordon v. Ellis*, 2 C. B. 821.

An action may be maintained by several partners of a firm upon a guarantee given to one of them, if there be evidence that it was given for the benefit of all. *Garrett v. Handley*, 4 B. & C. 664.

A guarantee for goods addressed to one of two partners, may be de-

clared on, as given to both, if it appeared that the partner to whom it was addressed did not carry on any separate business (*Walton v. Dodson*, 3 C. & P. 162), but a guarantee not addressed to any one must be declared on as given to the party to whom or for whose use it was delivered. *Ib.*; and see *Moller v. Lambert*, 2 Campb. 548.

Where a security, whether by specialty (*Arlington v. Merrick*, 2 Wms. Saund. 412 and notes; *Strange v. Lee*, 3 East, 484; *Pemberton v. Oakes*, 4 Russ. 154; *Dance v. Girdler*, 1 Bos. & P. N. R. 84; *Wright v. Russel*, 2 Bl. 934; *Weston v. Barton*, 4 Taunt. 678; *Chapman v. Beckinton*, 3 Q. B. 708) or by simple contract (*Myers v. Edge*, 7 T. R. 254; *Dry v. Davy*, 10 Ad. & Ell. 30; *Ex parte Kensington*, 2 V. & B. 79; *Holland v. Teed*, 7 Hare, 50), is given to a firm for future advances, if it is intended to remain in force notwithstanding any change in the partnership, it must appear either by express words or by implication that such was the intention of the parties, otherwise upon any change in the partnership, as by the coming in of a new partner, or upon the death or outgoing of one of the old partners, the obligation will cease.

With regard to a guarantee to or for a firm, see 19 & 20 Vict. c. 97, s. 4.

The principle on which these cases proceed is well stated in *Strange v. Lee*, 3 East, 484. There a bond given by the defendant after reciting that Blyth intended to open a banking account with Wal-

wyn, Strange and the other plaintiffs as his bankers, was conditioned for payment to *them* of all sums from time to time advanced to Blyth at the banking-house of the said Walwyn, Strange, etc. It was held by the Court of King's Bench that on the death of Walwyn such obligation ceased and did not cover future advances made after another partner was taken in, and that Blyth, who was indebted to the house at the death of Walwyn, having afterwards paid off the balance which was applied at the time to the old debt incurred in Walwyn's lifetime, the defendant was wholly discharged from his obligation. "The Court," said Lord Ellenborough, C. J., "will no doubt construe the words of the obligation according to the intent of the parties to be collected from them; but the question is what that intent was? The defendant's obligation is to pay all sums due to '*them*,' on account of their advances to Blyth. Now who are '*them*' but the persons before named, amongst whom is Walwyn; who then constituted the banking-house, and with whom the defendant contracted? The words will admit of no other meaning, and indeed with respect to any intent which parties entering into contracts of this nature may be supposed to have, it may make a very material difference in the view of the obligor, as to the persons constituting the house at the time of entering into the obligation, and by whom the advances are to be made to the party for whom he is

surety. For a man may very well agree to make good such advances, knowing that one of the partners on whose prudence he relies will not agree to advance money improvidently. *The characters therefore of the several partners may form a material ingredient in the judgment of the obligor upon entering into such an engagement.*" See also *Barclay v. Lucas*, 1 T. R. 291; *Simson v. Cooke*, 1 Bing. 452; *Simson v. Ingham*, 2 B. & C. 65; *Leadley v. Evans*, 2 Bing. 32; *Saunders v. Taylor*, 9 B. & C. 35.

With regard to the mode in which the rights of a partnership against third persons may be determined, it may be remarked that one of the partners may in the absence of fraud release third parties from their liability to the firm (*Wallace v. Kelsall*, 8 Dowl. 841), and payment of a partnership debt to one of the partners is as valid as a payment to all, even after dissolution (*Porter v. Taylor*, 6 Mau. & Selw. 156), and although there be a clause in the deed of dissolution, according to which another partner is to receive the debts. *King v. Smith*, 4 Car. & P. 108. So one partner may give time to a debtor of the firm, as by taking his acceptance (*Tomlin v. Lawrence*, 8 Moo. & P. 555; 6 Bing. 376), or he may by some act of his own prevent the partnership from suing because it would be unconscientious for himself to do so. See *Jacaud v. French*, 12 East, 317; there Jacaud and Blair, after indorsing a bill to Jacaud and Gordon, received securities from the

drawer, in order to take up and liquidate the bill, but they applied them to their own purposes. It was held by Lord *Ellenborough*, C. J., that Jacaud and Gordon could not sue the acceptor on the bill. "It is impossible," said his Lordship, "to sever the individuality of the person. Jacaud, being a partner with Blair, must be considered as having, together with Blair, received money from the drawers to take up this very bill. How then can he, because he is also a partner with Gordon in another house, be permitted to contravene his own act, and sue upon this bill, which has been already satisfied as to him." See also *Richmond v. Heapy*, 1 Stark. 202; *Sparrow v. Chisman*, 9 B. & C. 241; *Jones v. Young*, ib. 532; *Wallace v. Kelsall*, 7 Mees. & W. 264; *Gordon v. Ellis*, 2 C. B. 821.

8. *Dissolution of Partnership, when and how it may be effected.*—Partnership may be dissolved in various ways: (1) By operation of law. (2) By the parties themselves, or some of them. (3) By the decree of a court of equity. 1st. *As to dissolution of the partnership by operation of law.*

A dissolution will take place when a person has lost his capacity to act *sui juris*, in consequence of his having been outlawed, or convicted and attainted of felony or treason, and it seems moreover the Crown thereupon becomes entitled not merely to the share of the offending, but also to that of the innocent partner, for by

an absurd doctrine still existing, though practically obsolete, it is held that as it is beneath the dignity of the Crown to become a tenant in common, or joint-tenant of anything with a subject, it is therefore entitled to the whole by virtue of its prerogative. 2 Black. Comm. 409; Wats. Partn. 377; Coll. Partn. 71.

The marriage of a female partner will of itself operate as a dissolution of the partnership, because, in the absence of any contract reserving her personal property to her separate use, it will belong to her husband absolutely, and he cannot be forced upon the firm as a partner; and moreover upon her marriage, except as regards property settled to her separate use, she becomes incapable of binding herself by any contract. See *Nerot v. Burnand*, 4 Russ. 247, 260; *Wrexham v. Hudleston*, 1 Swanst. 517 n.

A general assignment by one or more of the partners will operate as a dissolution of a partnership carried on for no definite period, and therefore determinable at will; and it seems, even where the partnership is for a definite period, if an assignment is *bonâ fide* made within that period, the same result will follow (*Heath v. Sansom*, 4 B. & Ad. 172; *Ex parte Barrow*, 2 Rose, 252); for in neither case can the purchaser be compelled to become a partner, nor can the other partners be compelled to receive him as such, and if they do so, a new partnership will be formed.

The Roman law seems to have

been the same in this respect. "Si quis ex sociis, mole debiti prægravatus, bonis suis cesserit, et ideo propter publica aut privata debita, substantia ejus veneat, solvitur societas: sed, hoc casu, si adhuc consentiant in societatem, nova videtur incipere societas." Inst. Lib. 3, tit. 26, § 8.

Upon the same principle, if a separate creditor of one partner take in execution the whole or part of the partnership effects, he thereupon becomes by operation of law a tenant in common thereof with the other partners, and the partnership will be thereupon, either wholly or partially, dissolved, and upon a sale under the execution the purchaser merely stands in the place of the execution creditor, and is not a partner, but a mere tenant in common with the other partners. *Fox v. Hanbury*, Cowp. 445; *Skipp v. Harwood*, 2 Swanst. 585 n.; *Dutton v. Morrison*, 17 Ves. 193; *Waters v. Taylor*, ante, p. 298; *Holroyd v. Wyatt*, 1 De Gex & Sm. 125; *Habershon v. Blurton*, 1 De G. & Sm. 121; *Aspinall v. The London and North-western Railway Company*, 11 Hare, 325.

The insolvency or bankruptcy of one or more of the partners will of necessity operate as a dissolution of the partnership, for as the property of a bankrupt passes to his assignees he becomes unable to fulfil the partnership contract, and with regard to the assignees, the solvent partners are not obliged to admit them into, and their own duties will not allow them to carry

on, the partnership (*Fox v. Hanbury*, Cowp. 445; *Ex parte Smith*, 5 Ves. 295; *Wilson v. Greenwood*, 1 Swanst. 471, 482, 483; *Crawshay v. Collins*, 15 Ves. 218, 228); and in the event of bankruptcy, the dissolution which takes effect immediately upon the adjudication will have relation back to the act of bankruptcy. *Barker v. Goodair*, 11 Ves. 83; *Dutton v. Morrison*, 17 Ves. 193, 203, 204; *Fox v. Hanbury*, Cowp. 445; *Harvey v. Crickett*, 5 Mau. & Selw. 336; *Thomason v. Frere*, 10 East, 418.

Where partners are the subjects of different countries, it seems that a declaration of war between those countries will *ipso facto* dissolve the partnership, not only because one alien enemy cannot make a contract binding upon the other, but because it is the inevitable result arising from the new relations created by war, that it becomes unlawful to have any communication or trade with each other as being enemies; in effect, in the words of Chancellor *Kent*, a state of war creates disabilities, imposes restraints, and exacts duties altogether inconsistent with the continuance of that relation. A partnership formed between aliens must at once be defeated when they become alien enemies. They can no more assist each other than if they were palsied in their limbs, or bereft of their understandings by the visitation of Providence. *Griswold v. Waddington*, 16 Johns. 438, 488, 492.

Lastly, a partnership, although it may have been entered into for

a definite period and between many persons, will be dissolved upon the death of *one* of them, unless there be an express stipulation to the contrary (*Gillespie v. Hamilton*, 3 Madd. 254; *Crawshay v. Maule*, ante, 296); and this will take place at that time with respect to the other partners and to third persons, irrespective of the consideration whether they have had notice thereof or not. *Vulliamy v. Noble*, 3 Mer. 593, 614.

2nd. *As to the dissolution of partnership by the partners themselves.* It is clear that although a partnership may have been entered into for a limited period, it may be dissolved by the consent of *all* (clearly and unconditionally expressed. *Hall v. Hall*, 12 Beav. 414); but not, it seems, by the mere will of one of the partners. *Peacock v. Peacock*, 16 Ves. 56; *Crawshay v. Maule*, ante, p. 288. Where, however, no time has been fixed for its duration, it is considered to be a mere partnership *at will*, and may consequently be dissolved upon one or more of the partners giving proper notice to the others. *Master v. Kirton*, 8 Ves. 74; *Miles v. Thomas*, 9 Sim. 606-609; *Nerot v. Burnand*, 4 Russ. 247-260; 2 Bligh. N. S. 215.

It seems, however, that we have not adopted the distinction of the *Roman law*, that such dissolution ought to be made at a seasonable time. Mr. Swanston, indeed, in his note to *Crawshay v. Maule*, 1 Swanst. 512, has observed that in one instance the Court of Chancery seems to have assumed jurisdiction

to qualify the right of renunciation, by reference to that distinction. The case alluded to is that of *Chavany v. Van Sommer*, 3 Woodeson, Lect. 416 n. Lord Eldon, however, in a well-known case, was clearly of a different opinion. "With regard," said his Lordship, "to what has passed since, the question was much agitated at the bar, whether this partnership is now dissolved by the notice in writing from the defendant, that from and after the date of that notice the partnership should be considered dissolved. The plaintiff insists that it is not dissolved; and that it can be dissolved only upon *reasonable notice*. I have always *taken the rule to be, that in the case of a partnership not existing as to its duration by a contract between the parties, either party has the power of determining it when he may think proper*, subject to a *qualification* I shall mention. There is, it is true, inconvenience in this; but what would be more convenient? In the case of a partnership expiring by effluxion of time, the parties may, by previous arrangement, provide against the consequences: but where the partnership is to endure so long as both partners shall live, all the inconvenience from a sudden determination occurs in that instance as much as in the other case. I cannot agree *that reasonable notice is a subject too thin for a jury to act upon*; as in many cases juries and courts do determine what is reasonable notice. With regard to the determination of

contracts upon the holding of lands, when tenancy at will was more known than it is now, the relation might be determined at any time, not as to those matters which, during the tenancy, remained a common interest between the parties: but as to any new contract the will might be instantly determined. When that interest was converted into the tenancy from year to year, the law fixed one positive rule for six months' notice: a rule that may in many cases be very convenient; in others, that of nursery-grounds for instance, most inconvenient. As to trades in general, there is no rule for the determination of partnership; and I never heard of any rule with regard to different branches of trade; and, supposing a rule for three months' notice, that time might in one case be very large; and in another, in the very same trade, unreasonably short.

"I have, therefore, always understood the rule to be, that in the absence of express contract the partnership may be determined, when either party thinks proper; but not in this sense, that there is an end of the whole concern. All the subsisting engagements must be wound up; for that purpose they remain with a joint interest; but they cannot enter into other engagements. This being the impression upon my mind, I had some apprehension from the turn of the discussion here, that some different doctrine might have fallen from the Court at Guildhall; but upon inquiry from the Lord Chief

Justice as to his conception of the rule, I have no reason to believe that if this notice had been given before the trial, the jury would not have been directed to find that the partnership was by the delivery of that paper dissolved." *Peacock v. Peacock*, 16 Ves. 56. See also *Featherstonhaugh v. Fenwick*, 17 Ves. 298-308, 809; *Crawshay v. Maule*, 1 Swanst. 495-508.

It may be here mentioned that although a certain number of partners have the power, under the articles of partnership, of expelling one of their number, and taking to his share at a valuation, still that power must be exercised in good faith, and not against the truth and honour of the contract, inasmuch as it must be understood to exist, not for the benefit of any particular partners, but for the benefit of the whole society or partnership, and it cannot, therefore be exercised merely to enable the continuing partners to appropriate to themselves the share of the expelled partner at a fixed value less than the true value. See *Blisset v. Daniel*, 10 Hare, 493, where it was held that such a power of expulsion was not properly exercised at the exclusive instance of one partner, and in consequence of his representation to the other partners, made without the knowledge and behind the back of the partner who was expelled, and without giving to such partner the opportunity of stating his case and removing any misunderstanding on the part of his copartners.

Next, a partnership may expire by the efflux of the time fixed upon by the partners for the limit of its duration. *Featherstonhaugh v. Fenwick*, 17 Ves. 298. And where after a partnership has expired by efflux of time, the business is still carried on by the partners, it will be considered as a new partnership for an indefinite period, determinable immediately at the will of any of the partners, although under the original articles of partnership notice for a dissolution of so many months are requisite. *Featherstonhaugh v. Fenwick*, 17 Ves. 298-307.

A partnership may also expire by the thing constituting the subject-matter of the contract ceasing to exist. For instance, suppose two persons buy a ship to be employed by them for their mutual profits as partners, and the ship be afterwards lost, the partnership would necessarily be at an end. "Neque enim ejus rei quæ jam nulla sit, quisquam socius est." Dig. Lib. xvii. tit. 2, l. 63, § 10.

The same result will follow on the termination of the business, for which solely the contract of partnership was entered into. For example, if two merchants have contracted a partnership to buy a lot of goods and to sell them at a particular place, it is clear that the partnership will terminate when they have sold them all there. Poth. Partn. § 143.

3rd. *As to dissolution by decree of the court of equity.* Although a partnership may not be dissolvable by the operation of law, or by the parties themselves, it may,

upon a proper case being made out, be dissolved by a court of equity.

In the first place, it may be dissolved from its commencement, where it originated in fraud, misrepresentation, or oppression. *Colt v. Wollaston*, 2 P. Wms. 154; *Green v. Barrett*, 1 Sim. 45; *Rawlins v. Wickham*, 6 W. R. 509 (V.C.S.); 7 W. R. 145 (L. J.) See also *Tattersall v. Groote*, 2 Bos. & P. 131; *Ex parte Broome*, 1 Rose, 69; *Oldaker v. Lavender*, 6 Sim. 239; *Hue v. Richards*, 2 Beav. 305.

Another ground upon which the Court will dissolve a partnership, in its origin unobjectionable, is the gross misconduct of one of the partners, amounting to a want of good faith, which is necessary to carry on the partnership concern (*Chapman v. Beach*, 1 J. & W. 594), as, for instance, where a partner raises money for his private use on the credit of the partnership firm (*Marshall v. Colman*, 2 J. & W. 268), or his conduct amounts to an entire exclusion of his partner from his interest in the partnership (*Goodman v. Whitcomb*, 1 J. & W. 598), or if he receives moneys and does not enter the receipts in the books, or if he does not leave them open to the inspection of the partners (*Ib.*; and see *Smith v. Mules*, 9 Hare, 556-569; *Smith v. Jeyes*, 4 Beav. 503-505); or if, contrary to the opinion and wish of his partner, he allows a person to draw bills upon the partnership, and directs them to be paid out of the joint effects of the partnership. *Master v. Kirton*, 3

Ves. 74. So where the conduct of one of the partners is such as to prevent the concern from being carried on according to the contract. *Waters v. Taylor*, 2 V. & B. 304; *Smith v. Jeyes*, 4 Beav. 503; *Harrison v. Tennant*, 21 Beav. 482. And it is stated in 7 Jarman's Conveyancing, p. 83, upon the authority of a MS. case, *De Berenger v. Hammel*, cor. Sir L. Shadwell, V. C., 13 Nov. 1829, that violent and lasting dissension, as where the parties refuse to meet each other upon matters of business—a state of things which precludes the possibility of the partnership from being conducted with advantage, will be a sufficient ground for a court of equity to decree a dissolution.

But the Court will not decree a dissolution for slight misconduct (especially if there has been acquiescence), or on the ground of mere ill-temper on the part of one of the partners. "Where partners differ," says Lord Eldon, "as they sometimes do when they enter into a different kind of partnership, they should recollect that they enter into it for better and worse, and this Court has no jurisdiction to make a separation between them, because one is more sullen or less good-tempered than the other. Another Court, in the partnership to which I have alluded, cannot, nor can this Court in this kind of partnership, interfere, unless there is a cause of separation, which in the one case must amount to downright cruelty, and in the other must be conduct amounting to an

entire exclusion of the other partner from his interest in the partnership." *Goodman v. Whitcomb*, 1 J. & W. 592; and see *Wray v. Hutchinson*, 2 My. & K. 235; *Astle v. Wright*, 23 Beav. 77.

Moreover the Court will dissolve a partnership in some cases where no personal blame attaches upon any of the partners, as, for instance, where it has become impossible to carry it on according to the intent and meaning of the contract, as in *Baring v. Dix*, 1 Cox, 213, where the partnership was originally instituted for spinning cotton under a patent, which totally failed and was entirely given up. Lord *Kenyon* decided that if on a reference to the Master it was reported that the partnership could not be carried on, he would direct the premises to be sold, and would dissolve the copartnership. See also *Pearce v. Piper*, 17 Ves. 1; *Buckley v. Cater*, cited 17 Ves. 11, 15, 16; and in *Beaumont v. Meredith*, 3 V. & B. 180, 181; *Reeve v. Parkins*, 2 J. & W. 390. The Court of Chancery has also jurisdiction to dissolve a partnership of which the business cannot be carried on at a profit without further capital, each partner having contributed his share of capital; and it is not necessary to show that the concern is embarrassed. *Jennings v. Baddeley*, 3 K. & J. 78.

Another ground upon which the Court will dissolve a partnership is the incurable insanity of one of the partners (*Sayer v. Bennet*, 1 Cox, 107; *Kirby v. Carr*, 3 Y. & C. Excheq. Ca. 184; *Wrexham v. Hud-*

leston, 1 Swanst. 514 n.; *Jones v. Noy*, 2 My. & K. 125), for as Lord *Kenyon* has well observed, "where there are two partners, both of whom are to contribute their skill and industry in carrying on the trade, the insanity of one of them, by which he is rendered incapable to contribute that skill and industry on his part, is a good ground to put an end to the partnership, not by the authority of either of the partners, but by application to a court of justice, and this for the sake of the partner who is rendered incapable as well as of the other; for it would be a great hardship upon a person so disordered, if his property might be continued in a business which he could not control or inspect, and be subject to the imprudence of another." *Sayer v. Bennet*, Mont. Part. vol. i. Appen. p. 18; 1 Cox, 107; *Leaf v. Coles*, 1 De G. Mac. & G. 171, 417. (16 & 17 Vict. c. 70, s. 123.)

Permanent insanity however at the time when the relief is sought must be clearly proved, for if it appears to be doubtful whether it may not be of a temporary nature, an inquiry or issue will be directed (*Sayer v. Bennet*, 1 Cox, 107; *Besch v. Frolich*, 1 Ph. 175; Anon. 2 K. & J. 441); proof however of a person having been found a lunatic under a commission will be conclusive evidence in a suit for the dissolution of a partnership. *Milne v. Bartlet*, 3 Jur. 358.

On a bill to dissolve a partnership upon the ground of the lunacy of a partner, the Court will not,

unless there be a stipulation for dissolution in such an event at a particular time (*Bagshaw v. Parker*, 10 Beav. 532) make its decree retrospective even to the filing of the bill, still less to the time when the defendant first became incapable of attending to business. See *Besch v. Frolich*, 1 Ph. 172, in which case on its being urged that the Court ought to decree a dissolution from the time when the lunacy commenced, Lord *Cottingham* observed, "How can that be? Suppose the plaintiff became insolvent. The lunatic would be bound, notwithstanding this retrospective decree, to pay the partnership debts contracted during the time that the business continued to be carried on in the joint names. Besides it must be remembered that there are three considerations between partners. The share of each in the capital; the share of each in the goodwill; and the labour which each undertakes to devote to the business. Your argument is, that because one of these considerations fails, you are entitled from that time to take to yourself the whole benefit of the other two; and that too while your partner remains jointly liable for the debts of the partnership during the intermediate period. How can that be right? it would be contrary to all principles of justice." See also *Sander v. Sander*, 2 Coll. 276.

It seems that the costs of a suit for the dissolution of a partnership on the ground that the defendant has become a lunatic, though not found so by inquisition, will, after

decree declaring the partnership dissolved, be ordered to be paid out of the partnership funds. *Jones v. Welch*, 1 K. & J. 765.

Where a partnership is determinable on one of the partners giving notice to the other, he may give notice effectually notwithstanding his copartner is insane. *Robertson v. Lockie*, 15 Sim. 285.

When the court of equity dissolves a partnership, it will determine all the rights of the partners *inter se*, for instance, it will in a proper case direct the return of the whole or part of a premium for entering into the partnership. See *Astle v. Wright*, 23 Beav. 77, there the defendant agreed to pay £1000 for a share in the plaintiff's business of a surgeon in a partnership for fourteen years. The partners disagreed and the partnership was dissolved by the Court with the assent of both parties. Sir *John Romilly*, M. R., held that as there were faults on both sides, a due proportion of the premium ought to be returned. "There are certainly," said his Honour, "cases where Lord *Eldon* thought that this Court could not entertain a bill for a return of the premium, and that the party must be left to an action at law. But this certainly is not the way in which in modern times cases of dissolution of partnership have been dealt with, and at the bar I have obtained, and since leaving the bar I have made orders for dissolving partnerships, in which all the rights of parties have been determined in this Court, including the

return of the premium, wholly or in part, and the parties have not been left to work out any portion of their rights at law, the whole of them having been determined here. The rule in which I have followed other judges, is this:—that in the absence of any fraud or gross misconduct on either side, and where the continuation of the partnership has become impossible, by reason of incompatibility of temper, or other causes springing from the parties themselves and not accompanied by circumstances which are controlled by the contract, I have treated the premium as having been paid for the whole term of the partnership; I have apportioned so much of it as belonged to the period the partnership had lasted, and have ordered a return of the rest. Here a premium of £1000 (£500 paid down and £500 by instalments) was to be given for a partnership of fourteen years, and therefore one-fourteenth part of £1000 is, in my opinion, attributable to each year. The interest of the part paid is not to be accounted for, because this was according to the contract, and was the property of the person who received it." See also *Baring v. Dix*, 1 Cox, 213; *Akhurst v. Jackson*, 1 Swanst. 85; 1 Wils. C. C. 47; *Freeland v. Stansfield*, 2 Sm. & G. 479; *Bury v. Allen*, 1 Coll. 589.

Upon a proper submission of all the partners, the partnership may be dissolved by the award of an arbitrator (*Heath v. Sansom*, 4 B. & Ad. 172); and it has been held

that where there was a general reference to an arbitration of "all matters in difference" between two partners, the arbitrator had power by his award to direct the partnership to be dissolved. *Green v. Waring*, 1 Wm. Black. 475.

9. *Effects and Consequences of a Dissolution*.—Having seen what will, either of itself or by means of the Court of Chancery, effect a dissolution of partnership, it remains to consider what are the effects and consequences of a dissolution. First, as between the partners themselves; and, secondly, as between the partners and third parties.

As to the effects and consequences of a dissolution between the partners themselves:—

After the dissolution none of the partners can enter into any new engagements so as to bind the others, for although a community of interests and a connection, to some extent, remains, it exists only for the purpose of winding up the affairs of the partnership. *Ex parte Williams*, 11 Ves. 5; *Peacock v. Peacock*, 16 Ves. 57; *Crawshay v. Collins*, 15 Ves. 218, 226; *Crawshay v. Maule*, ante, p. 287; *Luckie v. Forsyth*, 3 J. & L. 389.

Each of the partners has a right, upon dissolution, to insist that the funds of the partnership shall be applied in discharge of the partnership debts and liabilities,—a step necessarily preparatory to a division of the surplus among them. And to effect this object a single partner, although he could not

bind the partnership by any *new* engagement, may pay and collect the debts and property of the partnership, and give receipts and discharges which will be binding upon the others. *Fox v. Hanbury*, Cowp. 445; *Harvey v. Crickett*, 5 Mau. & Sel. 336; *Woodbridge v. Swann*, 4 B. & Ad. 633; *Smith v. Oriell*, 1 East, 368.

But the court of equity, as we have before seen, will by injunction prevent any dealing with the partnership effects in a manner inconsistent with the purpose of winding up the concern; for instance, when one partner seeks to exclude the others from the part in the concern which they are entitled to take, or carries on the trade on his own account with the partnership property, and if it be necessary to effect these objects, the Court will appoint a receiver or manager to wind up the concern. *Harding v. Glover*, 18 Ves. 281; *Crawshay v. Maule*, *ante*, p. 287; *Wilson v. Greenwood*, 1 Swanst. 481; *Dacie v. John*, M'Clell. 206.

A partner may however do any act necessary for *winding up* the affairs of the partnership; thus, he may deal with the partnership property, pay and collect debts due to and from the partnership, adjust and settle unliquidated debts, and give proper acquittances and receipts. See *Fox v. Hanbury*, Cowp. 445; *Harvey v. Crickett*, 5 Mau. & S. 336; *Woodbridge v. Swann*, 4 B. & Ad. 633; *Smith v. Oriell*, 1 East, 368; *Luckie v. Forsyth*, 3 J. & L. 389; *Butchart v. Dresser*, 10 Hare, 453; 4 De G. Mac. & G. 542.

So long as a partner confines himself to the proper exercise of his duty in winding up the concern, he will be protected by the Court of Chancery; but the Court will at the same time protect the partnership if he acts in a manner inconsistent with the proper performance of his duty. Thus a partner will not be allowed to derive any private advantage by the composition of debts due to or from the partnership. *Beak v. Beak*, Ca. t. Finch 190; S. C. 3 Swanst. 627; *Crawshay v. Collins*, 15 Ves. 218, 229. So where one partner has, without the knowledge of the others, obtained an agreement for a house for partnership purposes in his own name only, on the dissolution of the partnership by death or otherwise, it will be considered as part of the partnership property. *Alder v. Fouracre*, 3 Swanst. 489; *Elliot v. Brown*, 3 Swanst. 489 n. Nor will any of the partners, in the absence of a stipulation to that effect, be allowed any compensation for his trouble in winding up the concern, for what he may do would only be a performance of his duty as a partner. *Heathcote v. Hulme*, 1 J. & W. 122; *Whittle v. Macfarlane*, 1 Knapp, 311; *Thornton v. Proctor*, 1 Anst. 94; *Burden v. Burden*, 1 V. & B. 170; *Stocken v. Dawson*, 6 Beav. 371.

As a general rule, on the death of a partner, in the absence of express stipulation or any direction in his will (*Chambers v. Howell*, 11 Beav. 6.), his representative is entitled to have the whole concern

wound up and disposed of; and if the surviving partner continues the trade, the representative of the deceased partner may elect to take his share of the profits or may charge the survivor with interest on the amount of the capital retained and used by him. *Clements v. Hall*, 2 De G. & Jo. 186; see also *Wedderburn v. Wedderburn*, 2 Keen, 722; 4 My. & Cr. 41; 22 Beav. 99; *Travis v. Milne*, 9 Hare, 141.

If the property of the partnership consists in part of leaseholds, the representative of the deceased partner may treat the survivor as a trustee; and if the survivor renews the lease he is considered to do so for the benefit of the partnership. *Ib.*; *Clegg v. Fishwick*, 1 Mac. & G. 294.

This rule however has been to some extent departed from where the trade is one of a speculative character, requiring great outlay with uncertain returns. There if the surviving partner renews the lease in his own sole name, and carries on the business with his own capital and in his own name, the Court will not in general assist the representative of the deceased partner unless he comes forward promptly and is ready to contribute a due proportion of money for the purpose of the business, as it would be unjust to permit the executor of the deceased partner to lie by and remain passive while the survivor is incurring all the risk of loss, and only to claim to participate after the affairs have turned out to be prosperous. *Norway v. Rowe*,

19 Ves. 144; *Prendergast v. Turton*, 1 Y. & C. C. C. 98; S. C. on appeal 13 L. J. (N. S.) Ch. 268; see also *Hart v. Clarke*, 6 De G. Mac. & G. 232.

Where, however, a surviving partner has refused to give the representatives of a deceased partner all the information, as to the state of the concern, which was necessary, in order to enable them to exercise a sound discretion as to whether they should claim an interest in, and take a share in the risks of the concern, they will be allowed to make a claim after the lapse of a considerable length of time. *Clements v. Hall*, 2 De Gex & Jo. 173, reversing the decision of Sir *J. Romilly*, M. R., 24 Beav. 333.

When a surviving partner has carried on the partnership business without withdrawing from the concern the capital or share of a deceased partner, there is no absolute rule that, in taking the subsequent accounts of the partnership dealings as between the surviving and the estate of a deceased partner, the division of the profits shall be determined by the aliquot shares of the several partners in the business, in their joint lifetime, or by the amount of the capital which they were respectively to supply, or by the actual amount of the capital belonging to the surviving, and the estate of the deceased partner respectively; but the principle of division may be affected by considerations of the source of the profit, the nature of the business, and other circum-

stances of the case. *Willett v. Blanford*, 1 Hare, 253; *Simpson v. Chapman*, 4 De G. Mac. & G. 154, 171.

On the dissolution of a partnership by bankruptcy as it takes effect from the time when the act of bankruptcy was committed, from that time bankrupt partners cease to have any interest in or power over the partnership effects and concerns, which become vested in the assignees as tenants in common with the solvent partners. *Barker v. Goodair*, 11 Ves. 78; *Dutton v. Morrison*, 17 Ves. 193; *In re Wait*, 1 J. & W. 605; *Thomason v. Frere*, 10 East, 418. And at law actions must be brought in the names of the assignees and solvent partners jointly. *Thomason v. Frere*, 10 East, 418; *Graham v. Robertson*, 2 T. R. 282; *Franklin v. Lord Brownlow*, 14 Ves. 557. Although it seems actions by third persons should be brought against the solvent partners and the bankrupt. 1 Chitty on Plead. 62, 63, 6th ed. And the solvent partners cannot, from the time of the bankruptcy, engage in new transactions. *Harvey v. Crickett*, 5 Mau. & S. 336; *Thomason v. Frere*, 10 East, 418. But both the solvent partners, and it seems also the assignees, may do all such acts as are necessary to wind up the partnership.

If the solvent partners combine to carry on the business of the partnership, and enter into new contracts, it will be at their own risk, as they will be liable, at the option of the assignees, to account for the profits, or pay interest on

the share of the bankrupt partner, and they will be subjected moreover to all the losses. *Crawshay v. Collins*, 15 Ves. 218; 2 Russ. 325; *Brown v. De Tastet*, Jac. 295.

The power of a solvent partner, upon the bankruptcy of his copartner, to sell the partnership property is given to him in his personal capacity, to enable him to wind up the affairs of the partnership, and cannot be transferred by him to another, either by assignment of "all his share and interest" in the partnership, or by exposing himself, although *bonâ fide*, to a judgment under which all such share and interest is taken in execution. Thus where partnership goods had been taken in execution upon a *bonâ fide* judgment against a solvent partner whose copartner was bankrupt, upon a bill filed by the assignee, an injunction was granted by Sir W. Page Wood, V.C., to restrain the judgment creditor, who had purchased all the share, right, and interest of the solvent partner in the goods, and had subsequently professed to sell the whole as her own property, from delivering possession of the goods to the purchaser, and it was held that the plaintiff had not deprived himself of his right to this injunction by his own misconduct, in violently putting the defendant out of possession. *Fraser v. Kershaw*, 2 K. & J. 496.

With regard to partnership accounts, if there is any special agreement as to the mode in which they are to be taken it must be abided by (*Pettyt v. Jane-*

son, 6 Madd. 146), unless the parties have by their acts shown an intention to waive the agreement, in which case, as well as in the absence of any special agreement, the accounts must be taken in the usual way. *Jackson v. Sedgwick*, 1 Swanst. 469, as to which see Stor. Partn. § 349; Coll. Partn. 197, 2nd ed.

Where a surviving partner endeavours to baffle the Court of Chancery in taking the accounts, by withholding the partnership books and documents, he will be charged arbitrarily with the profits which it may be presumed have been made by the partnership. *Walmsley v. Walmsley*, 3 J. & L. 556.

Another question sometimes arises on a dissolution, how, after discharging the debts and obligations of the concern, the partnership effects are to be distributed. In the absence of any special agreement, it seems that the property of the firm, whether it consist of realty or personal chattels, ought, as was laid down in the principal case of *Crawshay v. Maule*, ante, p. 297, to be sold; and not even in the case of a dissolution caused by the death or bankruptcy of a single partner, can the surviving or solvent partners insist upon taking the partnership effects at a valuation. See also *Cook v. Collingridge*, Jac. 607; *Featherstonhaugh v. Fenwick*, 17 Ves. 298; *Wilson v. Greenwood*, 1 Swanst. 471; and see *Fox v. Hanbury*, Cowp. 445.

Where a suit is instituted for

the dissolution of a partnership, and it is clear on the bill and answer that some party is entitled to a dissolution, a sale of the partnership property may be directed on motion. *Crawshay v. Maule*, ante, p. 279; *Nerot v. Burnand*, 2 Russ. 56; and see *Goodman v. Whitcomb*, 1 J. & W. 589, 592.

It may be here mentioned that there is no such principle in equity that surviving partners cannot become purchasers from the representatives of the share of a deceased partner. *Chambers v. Howell*, 11 Beav. 6.

The question how long the estate of a deceased partner continues liable to the demands of surviving partners, is not, it seems, the subject of any positive enactment, except so far as a court of equity may found its rules upon analogous cases at law. It seems therefore that a court of equity will not, after six years' acquiescence, unexplained by circumstances or countervailed by acknowledgment, decree an account between a surviving partner and the estate of a deceased partner. *Barber v. Barber*, 18 Ves. 286; *Ault v. Goodrich*, 4 Russ. 430; *Martin v. Heathcote*, 2 Eden, 169; *Bridges v. Mitchell*, Gilb. Ex. Rep. 224; Bunb. 217; 15 Vin. Ab. tit. Limitations, F. 2 pl. 7, p. 110; *Foster v. Hodgson*, 19 Ves. 185; but see the remarks of Lord Brougham in *Robinson v. Alexander*, 8 Bligh, n. s. 352; 3 Cl. & Fin. 717.

In *Tatam v. Williams*, 3 Hare, 347, a bill filed by the surviving

partners against the executors of a partner who had died *thirteen* years before the institution of the suit, for an account of the partnership dealings and transactions, charging that the deceased partner was indebted to the firm at the time of his death, was dismissed by *Wigram*, V. C., with costs, on the ground of the lapse of time, no new liabilities of the former partnership appearing to have arisen or become known after the death of the deceased partner.

Effects and consequences of dissolution as to the rights of creditors. In considering the rights of persons who are creditors before dissolution, it must be remembered that they may be either *joint* creditors of all the firm, or *separate* creditors of individual members of the firm.

The rights of these creditors as against the partners themselves will not be altered by the dissolution of the partnership. *Ault v. Goodrich*, 4 Russ. 430; *Ex parte Peake*, 1 Madd. 359. But as the creditors during the partnership have, independent of contract, no lien upon the partnership effects, it is competent for a retiring partner, upon a voluntary dissolution, *bonâ fide* made, to assign his interest in the joint property to the remaining partner, so that it thereupon becomes his separate property, and is no longer liable to the claims of the joint creditors; and it is immaterial that the assignment is wholly or in part in consideration that the assignee shall pay the whole or part of the partnership debts. See *Ex parte Ruffin*, *post*, p. 346, and note.

Although while the partnership is going on, a creditor has no lien or equity against the joint effects of the partnership, he may bring an action against the partners; and get judgment, and execute the judgment against the effects of the partnership. But when he has got them into his hands, he has them by force of the execution, as the fruit of the judgment: clearly not in respect of any interest he had in the partnership effects while he was a mere creditor, not seeking to substantiate or create an interest by suit. *Ex parte Williams*, 11 Ves. 5.

Where however a dissolution takes place by the death or bankruptcy of a partner or by effluxion of time, or where there is a dissolution without any special agreement for the transfer of the property to the remaining partner, in all these cases the *partners* themselves or their representatives or assignees have a lien upon the whole property and an equity amongst each other that the effects should be properly applied in payment of the debts and winding up the accounts, in order that the surplus may be distributed amongst them according to their different interests; the joint creditors therefore, through the medium of the partners and in a derivative and subordinate manner, thus obtain a quasi-lien upon the partnership effects. *Ex parte Ruffin*, 6 Ves. 119, 126, 127; *Ex parte Williams*, 11 Ves. 3; *Ex parte Kendall*, 17 Ves. 514.

The lien of the representative of a deceased partner, in respect of a

debt due by the partnership, will, it seems, only attach to the specific partnership property existing at the date of the dissolution, and will not extend to any property acquired by the surviving partner after the dissolution. *Payne v. Hornby*, 25 Beav. 280.

At law, where the dissolution takes place in consequence of the death of one of the partners, the joint creditors can only proceed against the survivors (*Godson v. Good*, 6 Taunt. 587; *Richards v. Heather*, 1 Barn. & Ald. 29); in equity, however, as partnership debts are considered joint and several, joint creditors, instead of proceeding at law against the survivors, may, whether the survivors are insolvent or bankrupt, proceed against the estate of the deceased partner. *Devaynes v. Noble*, 1 Mer. 530; S. C. 2 Russ. & My. 495; *Sumner v. Powell*, 2 Mer. 37; *Wilkinson v. Henderson*, 1 My. & K. 582; *Thorpe v. Jackson*, 2 Y. & C. Excheq. Ca. 553. But the surviving partners would be properly joined as defendants in such suit in equity, as they would be interested in contesting the demands of the joint creditors. See *Wilkinson v. Henderson*, 1 My. & K. 582.

As to the administration of partnership assets in bankruptcy, see *Ex parte Rowlandson*, and note, *post*.

In the administration of the assets of a deceased partner in equity, where both partners are solvent, there is no distinction made between joint and several creditors, they are all paid, and in taking the partnership accounts the joint debts thus paid will be allowed in account with the surviving partner (19 Beav. 115); if the estate of the deceased partner be insolvent, and that of the surviving partner solvent, the joint creditors will naturally proceed against the surviving partner, who will then be a creditor against the separate estate of the insolvent partner for the amount paid by him to the joint creditors beyond his own proportion (*Ib.*); but if both the deceased and surviving partner are insolvent, then the joint creditors must resort in the first instance to the joint estate, and can only go against the separate estate of each partner after the claims of his separate creditors have been satisfied (*Ib.*). If both partners die before administration takes place, the rule is the same. *Ridgway v. Clare*, 19 Beav. 111, 117. And see *ante*, p. 316.

EX PARTE RUFFIN.

June 6, 1801.

[REPORTED 6 VES. 119.]

PARTNERSHIP—CONVERSION OF JOINT INTO SEPARATE ESTATE.] —

A fair dissolution of partnership between two; one retiring and assigning the partnership property to the other; and taking a bond for the value, and a covenant of indemnity against the debts; the other continued the trade separately a year and a half, and then became bankrupt. Held that the joint creditors had no equity attaching upon partnership effects remaining in specie; and, at all events, such a claim ought to be by a bill, not a petition.

In June, 1797, Thomas Cooper, of Epsom, brewer, took James Cooper into partnership.

That partnership was dissolved by articles, dated the 3rd of November, 1798; under which the buildings, premises, stock in trade, debts, and effects, were assigned to James Cooper, by Thomas Cooper, who retired from the trade.

Upon the 2nd of April, 1800, a commission of bankruptcy issued against James Cooper, under which the joint creditors attempted to prove their debts, but the commissioners refused to permit them; upon which a petition was presented to Lord *Rosslyn*, who made an order that the joint creditors should be at liberty to prove, with the usual directions for keeping distinct accounts, and an application of the joint estate to the joint debts, and of the separate estates to the separate debts. At a meeting for the purpose of declaring a dividend, the commissioners postponed the dividend, in order to give an opportunity of applying to the Lord Chancellor; in consequence of which this petition was presented, praying that the partnership effects remaining *in specie*, and possessed by the assignees, may be sold; and that the outstanding debts may be accounted joint estate.

By the articles of dissolution the parties covenanted to abide by a valuation to be made of the partnership property; and James Cooper covenanted to pay the partnership debts then due, and to indemnify Thomas Cooper against them; and Thomas Cooper covenanted not to carry on the trade of a brewer for twenty years within twenty miles of Epsom. A bond for £3000, the calculated value of the partnership property assigned, was given to Thomas Cooper by James Cooper and his father, as surety.

In pursuance of the covenant, the partnership property, consisting of leases, the premises where the trade had been carried on, stock, implements, outstanding debts, and other effects, were valued by arbitrators at £2080, after charging all the partnership debts then due.

James Cooper, by his affidavit, stated that all the joint creditors knew of the dissolution and the assignment of the property; that advertisements were published; and that the deponent, after the dissolution, received many debts due to the partnership; but paid more on account of the partnership. His father, by affidavit, stated that he paid the interest of the bond regularly; and intended to pay the principal when due.

Mr. Romilly and Mr. Cullen for the joint creditors, and Mr. Bell for Thomas Cooper.—If one partner can, by assigning all his interest in the effects, prevent the joint creditors from going against those effects, fraud must be the consequence. The partners may agree to divide the effects, and carry on business separately. By this agreement between the partners, the whole fund of the joint creditors is taken away. Upon the principles, upon which the effects, joint at the date of the bankruptcy, are applied to the joint debts, effects joint at the dissolution of the partnership, and remaining the same *in specie* at the time the commission issues, should be considered joint property. The ground is, that credit has been given upon the faith of the joint property; and it is a fraud upon the persons giving that credit to apply that fund to the separate creditors, trusting only to the individual and separate effects; and that ground applies equally to this case. Until the partnership accounts are taken, there is no separate property but in the surplus after paying the partnership debts (*Taylor v. Fields*, 4 Ves. 396), the creditors standing in the place of the bankrupt. The joint creditors therefore have a mediate, if not a direct lien upon the whole of the partnership effects. At law the partnership creditors have more advantage than under a commission; taking the partnership effects

exclusively, and the separate effects with the separate creditors. What difference arises from the circumstance, that the partnership did not exist at the time of the bankruptcy? That is not sufficient to take the case out of the common rule. In *West v. Skip* (1 Ves. 239, 456) it is laid down, that upon a dissolution by agreement or by time, the partner out of possession is not divested of his property in and lien upon the partnership effects. The same right remains to an account of the partnership effects; in which the first item always is the payment of the partnership debts. The position that partners can, as between themselves, by any act or agreement alter the partnership stock, so as to affect the rights of third persons, cannot be maintained. Why have they not an equal right, in the same manner, to discharge their persons by such act or agreement; especially, if with the knowledge of the joint creditors; but *Heath v. Percival* (1 P. Wm. 682) shows, that circumstance will not bind them; the transaction being *res inter alios acta*. That an actual assignment and divesting partnership property out of one partner will not defeat the right against the partnership effects is proved by *Ex parte Burnaby* (1 Cooke's Bank. Law, 253, 4th ed.). No evidence is produced to show that the separate creditors thought this was separate property, and gave credit accordingly: it must, therefore, be taken that they knew it was not. The assignment is made upon condition, and subject to the payment of the partnership debts. A considerable part of the property consisted of debts, which are not assignable.

But this question has been decided by the order made by the late Lord Chancellor.

Mr. *Mansfield* and Mr. *Cooke* for the assignees.—No such attempt was ever made before, under such circumstances; a fair dissolution, and an assignment by one partner of all the effects to the other; and trade carried on by that other; and at this distance of time. Upon the petition before the late Lord Chancellor there was no debate; and the separate creditors not appearing, and Thomas Cooper consenting, the usual order was made. The circumstance, that part of the property consisted of debts makes no difference. Thomas Cooper is a solvent partner endeavouring to get what he can, through the medium of the joint creditors. It is perfectly immaterial to them; for he is solvent, and able to pay them. The petition is in truth his. If this was not a complete assignment, it will be impossible to draw the line. Why may not joint creditors as well, at the end of twenty years, fix upon a house or any specific

article, once partnership property? Certainly fraud will vitiate transactions of all sorts; but this would be a singular fraud; for if the bankruptcy does not follow soon enough to prevent the joint creditors from enforcing their remedy at law, the object cannot be attained; and it is only in bankruptcy that the question can ever arise; for at law the joint creditor takes joint as well as separate property, and the distribution takes place in bankruptcy only. The object of such a plan must be to serve the separate creditors, not the partners themselves; and the bankruptcy must follow so immediately as to prevent the creditors from pursuing their remedies at law. There is no pretence of fraud. The consideration was a bond; but the question is precisely the same, as if it was paid in money. The trade was carried on a year and a half, and there is nothing to show that any one looked on Thomas as a partner. The effect would be, that until all the joint debts are paid, there never could be a complete assignment from one partner to another. Consider, how separate creditors may be defrauded, giving credit to what they see as separate property. Cases infinitely stronger occur in daily practice, as the case of Shakeshaft, Stirrup, and Salisbury. One of three partners, by arrangement between them, happens, in the course of trade (he living in London, and the others in the country), to get into his possession a quantity of goods. A commission of bankruptcy issued. Lord *Thurlow* said he could not take accounts between the respective partners; but finding the effects in the hands of one, whatever might be the demands of the others, or the consequences to the joint creditors, the goods were the separate property of that one, and must be applied to his separate debts. There it happened by accident, that a considerable part of the partnership stock was transferred to one of the partners, not by an actual assignment for consideration, as in this instance, which is in effect a purchase. There is no sound distinction between this transaction and the sale of partnership effects to any other person, a stranger. After the assignment Thomas Cooper, in whose right the petitioners claim, had no interest whatsoever. None of the cases cited apply. The joint creditors have no lien, though in the arrangement in bankruptcy the joint effects are applied to the joint debts. The doctrine of *Skip v. West* is not disputed; that a partner put out of possession, whether by agreement or effluxion of time, does not lose his right; what were partnership effects at that time, still remain so; but Lord *Hardwicke* never said, that notwithstanding a sale of the partnership effects, and a separate trade carried on

with them for years afterwards by the person who bought them, they remain joint.

The agreement of partners can neither discharge goods nor the person; but it may change the property in the goods. *Heath v. Percival* has not the least relation to this case. There was no agreement to give up the joint bond. The party therefore had a right to enforce it, notwithstanding his giving time to Sir Stephen Evans. In *Ex parte Burnaby* it does not appear that any one of the partners had gone out; nor, when Crispe committed the act of bankruptcy; which might have been prior to the assignment. That assignment was merely of the share of one to the other, not attended with any dissolution of the partnership; which in this case was actually dissolved, and the share legally assigned. The partnership subsisting up to that time, there was a right to insist that the partnership debts should be paid.

With respect to the lien, in the case of *Lodge v. Fendal*, to which your Lordship has referred, De Fendall had paid £10,000 into a banker's hands, and immediately afterwards Lodge stopped payment. The utmost contended for there was, that the assignees of the separate estate might be at liberty to prove that sum, not to take it out. Lord *Thurlow* there established the rule, that, unless there was a transmutation of the estate by fraud, the creditors must take it, as it happened at the time of the bankruptcy. That rule has been since acted upon in other cases, and the law is established, that the date of the act of bankruptcy is the commencement of the lien, and until then there is no lien. At law there is no lien upon the effects of the debtor, until the execution is delivered to the sheriff. At the date of this deed there was neither act of bankruptcy nor execution. There being no lien therefore at law, what objection is there to this deed, public—attended with possession and upon *bona fide* consideration? The intent of the deed was to convey all the property to James Cooper. He was to use his capital in the continuing trade. For that purpose the assignment was necessary. It is not necessary in such a case to prove, that the separate creditors trusted to the apparent separate stock. To what else could they trust? James Cooper swears, no idea was entertained of his having any partnership property; that he contracted debts to the amount of £5000; and that he laid out considerable sums upon this very property; and that he paid partnership debts to the whole amount of what he received. But the case is not to be decided upon such circumstances, but on the legal rights of the

creditor. The joint property was liable to their execution, but in common with any other property. But suppose a separate creditor had obtained a prior judgment and execution, could that have been superseded by the subsequent execution of a joint creditor?

In *Hankey v. Garret* (1 Ves. Jun. 236), also referred to by your Lordship, the question was the same as in *Ex parte Burnaby*; whether under the separate bankruptcy there was a right to distribute the joint property among the joint creditors: Lord *Thurlow's* doubt being, whether the solvent partner had not a right to appear. That doubt has been of late got over; the Court having been in the habit of disposing of joint property under a separate commission without a bill, or the appearance of the other partner. But in those cases the question was not what is or is not joint property, but as to the jurisdiction.

Mr. *Romilly*, in reply.—Though this order was not made by Lord *Rosslyn* upon argument, it certainly did not pass as a mere matter of course. This must be decided as a general case. There is one very important fact, that there were outstanding debts to a very considerable amount. None of those debts could be collected but by action in the joint names of the two partners until the bankruptcy, and now of the assignees. The effect therefore was not to make James Cooper the legal owner: an equitable interest could only be transferred, subject to all equities and therefore to the equitable lien upon the covenant to pay all the debts; to which these outstanding debts, as well as the other property, were liable. The joint creditors claim, not by way of lien, but as having by the rules established in this Court an equitable claim upon the joint property, in preference to the separate creditors, until the former are paid 20s. in the pound. There is an analogy to the case of a partner dying; in which case all survives at law to the other; but this Court either in a suit or in bankruptcy would direct an account of all the debts at the dissolution. So, where an executor becomes bankrupt, all the effects would belong to the assignees, but the Court considers them trustees, as he was. So in this case the bankrupt was a trustee for the joint creditors after the dissolution of the partnership, as both were before. The case of *Lodge and Fendal* is materially distinguishable. In this the whole fund of the joint creditors is done away. In that also the question was not as to specific effects, but a sum of money paid in by one partner. These petitioners only say, these specific effects subsisting in the hands of this partner ought to be applied. *Ex parte Burnaby* is

an express decision upon the point. The ground of this claim is upon the assignment, not the dissolution, which is immaterial; but how can one partner assign all his property to the other without a dissolution? As to the fraud, suppose the person going out is insolvent, a case extremely likely to happen.

LORD CHANCELLOR ELDON.—This case is admitted, unless *Ex parte Burnaby* applies to it, to be new in its circumstances. Therefore, if I was of opinion that the petition could be supported, I should be very unwilling to express that in bankruptcy where my opinion would not be subject to review.

If the case I have mentioned has decided the point, there is the authority of Lord *Hardwicke* upon it; which would weigh down the most considerable doubt that I could be disposed to entertain.

I feel great difficulty in complying with the prayer of the petition, and when I read it was struck with it as a new case, and as one upon which I do not clearly see my way to the relief prayed. It is the case of two partners, who owed several joint debts, and had joint effects. Under these circumstances their creditors, who had a demand upon them in respect of those debts, had clearly no lien whatsoever upon the partnership effects. They had power of suing, and by process creating a demand, that would directly attach upon the partnership effects. But they had no lien upon or interest in them in point of law or equity. If any creditor had brought an action, the action would be joint; his execution might be either joint or several. He might have taken in execution both joint and separate effects. It is also true, that the separate creditors of each, by bringing actions might acquire a certain interest even in the partnership effects; taking them in execution in the way in which separate creditors can affect such property. But there was no lien in either.

The partnership might dissolve in various ways:—*First*, by death; *secondly*, by act of the parties (that act extending to nothing more than mere dissolution), without any special agreement as to the disposition of the property, the satisfaction of the debts, much less any agreement for an assignment from either of the partners to the others. The partnership might also be dissolved by the bankruptcy of one or of both, and by effluxion of time.

If it dissolved by death, referring to the law of merchants, and the well-known doctrine of this Court, the death being the act of God, the legal title in some respects, in all the equitable title would

remain, notwithstanding the survivorship; and the executor would have a right to insist, that the property should be applied to the partnership debts. I do not know that the partnership creditors would have that right, supposing both remained solvent.

So, upon the bankruptcy of one of them, there would be an equity to say, the assignees stand in the place of the bankrupt, and can take no more than he could, and consequently nothing, until the partnership debts are paid.

So upon a mere dissolution without a special agreement, or a dissolution by effluxion of time; to wind up the accounts the debts must be paid, and the surplus be distributed in proportion to the different interests.

In all these ways the equity is not that of the joint creditors, but that of the partners with regard to each other, that operates to the payment of the partnership debts. The joint creditors must of necessity be paid, in order to the administration of justice to the partners themselves.

When the bankruptcy of both takes place, it puts an end to the partnership certainly, but still it is very possible, and it often happens, in fact, that the partners may have different interests in the surplus, and out of that a necessity arises, that the partnership debts must be paid, otherwise the surplus cannot be distributed according to equity, and no distinction has been made with reference to their interests, whether in different proportions, or equally. Many cases have occurred upon the distribution between the separate and joint estates; and the principle in all of them from the great case of Mr. Fordyce (*Harman v. Fishar*, Cowp. 117) has been, that if the Court should say, that what has ever been joint or separate property shall always remain so, the consequence would be, that no partnership could ever arrange their affairs. Therefore, a *bond fide* transmutation of the property is understood to be the act of men acting fairly, winding up the concern, and binds the creditors, and therefore the Court always lets the arrangement be, as they (*i. e.* the parties to the arrangement) stand, not at the time of the commission, but of the act of bankruptcy.

Thomas Cooper is admitted to be solvent. He certainly has no such equity as if the partnership had been dissolved by bankruptcy, death, effluxion of time, or any other circumstance not his own act. But he dissolves the partnership a year and a half ago; and instead of calling upon these effects according to his equity at the dissolution to pay the partnership debts, he assigns his interest to the

other, to deal as he thinks fit with the property, to act with the world respecting it; desiring only a bond to pay a given value in three or four years. Therefore he, or his executors could not sue. If it was necessary for the creditors to operate their relief through his equity, he has no equity.

It is then said, and the circumstance had struck me, that all the property is not assignable at law: for instance, the debts; but as between the two Coopers they were the property of the bankrupt, for debts are within the statute of James (21 Jac. 1, c. 19, ss. 10, 11), and if left in the order and disposal of the bankrupt, he is proprietor of the debt. Therefore Thomas Cooper could never set up the insufficiency of the legal operation of the assignment against his own deed. The assignment was not made subject to the payment of the debts, but in consideration of a covenant, leaving no duty upon the property, but attaching a personal obligation upon the assignee to pay the debts. The creditors therefore cannot rest upon the equity of the partner going out.

I was struck with the argument of inconvenience: the inconvenience on all sides is great. To say this seems to me a monstrous proposition: that, which at any time during the partnership has been part of the partnership effects, shall in all future time remain part of the partnership effects, notwithstanding a *bond fide* act. Suppose, an improbable case, that the partners in Child's house chose to shift their shop from Temple Bar to the West-End of the town; and that house, now the property of the partnership, was *bond fide* bought by one of the partners, and the money was invested in the purchase of the new house, in which they were going to reside; suppose, a still more improbable case, that a year and a half or ten years afterwards they became bankrupt, would that house be the partnership effects? It would be so, if it remained without the legal interest being passed, or without any equitable claim, taking it out of the reach of a legal execution; but where the effect is a *bond fide* transaction of this sort, if it were held at any time afterwards to be partnership property, not for the purpose of satisfying demands of the partners, or of any creditor who cannot otherwise be satisfied, but to enable them to undo all the intermediate equities, commercial transactions could not go on at all. It would be much less inconvenient to examine the *bona fides* of each transaction than to say, such transaction shall never take place.

The case of *West v. Skip* falls within some of these observations I have made. *Heath v. Percival* does not apply at all. The bond

in that case was not given up; and therefore the creditor keeping the best security, and refusing to part with it, no inference can be made against the conclusion arising from that. *Hankey v. Garret* is also very different. There the partnership was dissolved by bankruptcy or by death, and there was no actual transfer of the property to take it out of the reach of legal execution. I am unwilling to make any observation upon *Burnaby's* case. I do not know how to understand it; whether there was anything special in the assignment, I cannot find out from the report. I shall endeavour to find the papers. It looks very like this case, if it is *in specie* this case, as an authority I should think myself bound to submit to it. But it is not *in specie* this case; there is so much doubt, whether this relief can be given, that I am satisfied it ought to be given, if at all, in a jurisdiction where my opinion would be subject to revision. My present inclination is, that the creditors have not this equity. I have considerable doubts also, whether, if they have it, Thomas Cooper would be benefited by it; and a further subject of grave and serious doubt is, whether, if the joint creditors disturb the arrangement, the separate creditors would not have a right to set the arrangement right at his expense.

I now think there is a circumstance that distinguishes *Burnaby's* case. The assignment was not by one to the other two, but by one to one of the other two, which may be very different. I think that circumstance distinguishes the case so much, that I shall consult the interests of the parties better by saying, they may file a bill, if they think proper, than by further delay.

Petition dismissed.

"If, upon the dissolution of a partnership," says a learned author, "the retiring partner *bonâ fide* assigns all his interest in the stock and effects to the remaining partner, who afterwards becomes bankrupt, so much of the partnership stock so assigned as remains in *specie* will vest in the assignees of the bankrupt as his separate property, and will be distributable

accordingly. The leading case upon the subject is *Ex parte Ruffin*." See Coll. Partn. 603, 2nd ed., and Belt's Supp. to Ves. Sen. 135; see also *Ex parte Fell*, 10 Ves. 347; *Ex parte Williams*, 11 Ves. 3; *Campbell v. Mullett*, 2 Swanst. 575, where this case has been commented upon and followed.

The decision in *Ex parte Ruffin*

depended upon this principle, that during the solvency and continuance of the partnership the creditors have no lien upon the partnership effects; it therefore followed that any one of them might assign his interest therein to the other partner, without the creditors having any lien upon it; that, in fact, by the assignment the joint effects of the partnership had become the separate property of the partner to whom the assignment was made; and therefore his separate creditors were entitled to be satisfied out of it before the joint creditors of the firm. See *Langmead's Trusts*, 20 Beav. 20; 7 De G. Mac. & G. 353.

It is true that upon the dissolution of a partnership, the joint creditors are entitled to have satisfaction out of the joint effects of the partnership before the separate creditors of each partner, but this arises, as is laid down by the Lord *Eldon*, in the principal case, not from any lien of the creditors, but from the equities existing between the partners, or their representatives or assignees.

This was clearly shown by Lord *Eldon* in the case of *Ex parte Williams*, 11 Ves. 5, where he explained the grounds upon which he decided the principal case. "The grounds," he observed, "upon which I went in *Ex parte Ruffin* were these. Among partners clear equities subsist, amounting to something like lien. The property is joint: the debts and credits are jointly due. They have equities to discharge each of them from

liability, and then to divide the surplus according to their proportions: or, if there is a deficiency, to call upon each other to make up that deficiency, according to their proportions. But, while they remain solvent, and the partnership is going on, the creditor has no equity against the effects of the partnership. He may bring an action against the partners; and get judgment; and may execute his judgment against the effects of the partnership. But when he has got them into his hands, he has them by force of the execution, as the fruit of the judgment: clearly not in respect of any interest he had in the partnership effects, while he was a mere creditor, not seeking to substantiate or create an interest by suit. There are various ways of dissolving a partnership: effluxion of time; the death of one partner; the bankruptcy of one (which operates like death); or, as in this instance, a dry naked agreement that the partnership shall be dissolved. In no one of these cases can it be said, that to all intents and purposes the partnership is dissolved; for the connection still remains, until the affairs are wound up. The representative of a deceased partner, or the assignees of a bankrupt partner, are not strictly partners with the survivor, or the solvent partner; but still in either of those cases that community of interest remains, that is necessary, until the affairs are wound up; and that requires, that what was partnership property before shall con-

tinue, for the purpose of a distribution, not as the rights of the creditors, but as the rights of the partners themselves require: and it is through the operation of administering the equities, as between the partners themselves, that the creditors have that opportunity; as in the case of death, it is the equity of the deceased partner that enables the creditors to bring forward the distribution."

In order, however, to convert the joint into separate property, by an assignment from one partner to another, two things are essential. First, the transfer must be complete; and, secondly, it must be *bond fide*.

1. *Transfer in order to convert joint into separate Property must be complete.*—In the principal case, it will be observed, that there was a legal deed of assignment of the partnership effects. Where, however, the partnership effects are *in specie*, it is perfectly immaterial whether the assignment takes place by agreement, or by deed, if there be an actual and corporeal handing over of the property. See *Ex parte Clarkson*, 4 Deac. & C. 67. Thus in *Ex parte Williams*, 11 Ves. 3, Shepherd and Smith, two partners, on the 5th of September, 1803, dissolved their partnership, and on the 25th of the following November inserted a notice in the 'London Gazette,' stating the dissolution, and that all debts due from the partnership were to be paid, and would be discharged by Shepherd. At the dissolution of

the partnership there were effects belonging to the partners to a considerable amount remaining in specie, and several outstanding debts to the partnership were still remaining due. The effects of the partnership appear to have been delivered up to Shepherd. On the 24th of December, 1803, a Commission of Bankruptcy issued against Shepherd. The joint creditors contended before the Commissioners that the specific property and outstanding debts, belonging to the partnership, were to be considered as joint effects, and applicable to joint debts; but the opinion of the Commissioners was, that such effects, remaining in specie, had, by the effect of the dissolution of the partnership, become the separate property of Shepherd, and applicable, in the first instance, to his separate debts; and in taking the accounts they refused to include any part of such specific effects, as forming part of the joint estate (except certain debts owing to the partners). Lord *Eldon*, C., dismissed a petition of appeal from the decision of the Commissioners. "The question," said his Lordship, "is whether the contract for dissolution has left the equities of the partners attaching upon the possession. If it is competent to partners to say, those equities shall no longer exist, inquiry is necessary to ascertain whether, by the bargain for the dissolution, that which was the property of all has become the property of one. In *Ex parte Ruffin* there could be

no doubt upon that: a legal instrument being produced, the legal effect of which was such as I have stated, that case was no more than that a bankruptcy happening a considerable time after the execution of the deed, the effects came to be considered the separate effects of the trader in whose hands they were left; and the other was only to come in as a creditor. Upon the facts of this case, without saying whether the conclusion of the Commissioners as to the joint debts is right, there is distinct evidence of an agreement, that the joint effects should be considered separate effects; and fact calls upon me to declare the conclusion of law, that these are separate effects."

Where the instrument affecting to assign the partnership property is merely an *executory* agreement, and something thereby agreed to be done is left undone at the time of the bankruptcy, it will not convert the joint into separate property. Thus in *Ex parte Wheeler*, Buck, 25, a retiring partner by agreement in writing assigned all the stock and debts to Mallam, the partner continuing in the business, who agreed to pay a debt owing by the former, and also to pay him an annuity, for the due payment of which it was stated that the father of the continuing partner (who was not a party to the agreement) should be security. Mallam's father refused to become a security for his son. It was held by Lord Eldon, C., that the partnership stock was not

transferred by the agreement to Mallam. "The first question," said his Lordship, "is whether this is an actual legal assignment or an executory agreement; because if it is only an executory agreement, circumstances have occurred, as appears by the evidence, that may have the effect of putting an end to it. I think it is to be collected from the agreement, that the father was to join in being security for payment by the son. But Mallam's father refused to give such security; therefore that further act which was necessary to be done in order to complete the transfer of the property, did not happen before the bankruptcy." See *vide Young v. Keighly*, 15 Ves. 557.

Upon the same principle, where, after a dissolution and an assignment of the partnership effects to one of the partners, the retiring partner filed a bill against him, alleging fraud in the non-performance of the articles of dissolution, and praying an injunction and a receiver, which were ordered, it was held by Lord Eldon, C., upon a subsequent bankruptcy, that such interference of the Court restored the property to its original character, as joint property, unless the plaintiff in equity had, by his conduct between the time of his obtaining the injunction and the bankruptcy, rendered nugatory the effect of such interference. *Ex parte Rowlandson*, 1 Rose, 416; *Ex parte Barrow*, 2 Rose, 252; *Ex parte Pemberton*, 2 Mont. & A. 548; 1 Deac. 421.

The mere fact, that part of the

consideration payable on an agreement, for a dissolution of partnership by which the stock is assigned to one of the partners, is made up of bills of exchange, payable at a future time, will not be sufficient to render the agreement *executory*, and the joint will be converted into separate property, though the bills may not be paid. In such a case the bills of exchange are looked upon as a mere *mode of payment*, and the person taking them has the usual remedies by action in case of their dishonour, or in the event of bankruptcy by proof. *Ex parte Clarkson*, 4 Deac. & C. 56, 67, 68; *Ex parte Gibson*, 2 Mont. & A. 4.

In the case of real property, in the event of the non-payment of the purchase-money, the retiring partner would have a lien for the unpaid purchase-money. See *Mackreth v. Symmons*, 1 Lead. Cas. Eq. 235; *Ex parte Peake*, 1 Madd. 346; *Grant v. Mills*, 2 V. & B. 306; *Ex parte Gibson*, 2 Mont. & A. 4.

But if, notwithstanding an assignment, the personal effects remain in the order and disposition of the partnership, the joint creditors will be entitled to them.

In order to take debts due to the partnership out of the order and disposition of all the partners, it is essential that actual notice of an assignment from the retiring partners to the partner continuing the business should be given to the debtors, a mere notice in the 'Gazette' not being sufficient for that purpose. Thus in *Ex parte Burton*, 1 Glyn and Jam. 207, in

and previous to August, 1816, Fossett, Cooper, and Howard carried on business under the firm of Messrs. Fossett & Co. By indenture dated the 29th of August, 1816, the partnership was dissolved, and the debts and effects owing and belonging to the said partnership were assigned by Cooper and Howard to Fossett, who covenanted to discharge all the debts owing by the partnership. On the 31st of August, 1816, notice was published in the 'Gazette,' stating the dissolution of the partnership, and that all the debts due to, and owing by the partnership would be received and paid by Fossett. It was held by Sir John Leach, V.C., that the assignment of the 29th of August, 1816, converted the debts which were due to the partnership from persons who had notice of such assignment, into the separate estate of Fossett; and that the said assignment did not convert the property in debts due to the partnership from persons who had no notice of the assignment. "By the assignment," said his Honour, "from Cooper and Howard to Fossett, the latter became the true owner of the partnership debts; but until notice were given to the debtors, the debts remained in the order and disposition of the partnership. It is true, that Fossett stood in a different situation from a stranger, to whom the debts might have been assigned; because in his character of partner, and independently of the assignment, he was personally competent to receive and discharge the debts;

but the answer is, that until notice were given to the debtors, the other partners were equally competent to receive and discharge the debts; and, therefore, the order and disposition remained in the partnership. It does not appear to me, therefore, that there is any substantial distinction between an assignment of debt to a stranger or a partner; and I am of opinion that the debts owing by those debtors who had no notice of the assignment to Fossett, remained in the order and disposition of the partnership at the time of the bankruptcy, and are distributable among the joint creditors." See also *Ex parte Williams*, 11 Ves. 3, *ante*, p. 357; *Ex parte Usborne*, 1 Glyn & Jam. 358; and see *Ex parte Gibson*, 2 Mont. & A. 10; 2 Sim. 257; *Ex parte Leaf*, 1 Dea. 176.

A mere dissolution of the partnership or the retirement of one of the partners from trade will not have the effect of converting the joint property of the partnership into separate property, for, in the words of Lord Eldon, "that does no more than declare, that the partnership is not to be carried on any further, except for winding up the affairs: and he who has actual possession has it clothed with a trust for the other, to apply the property to the debts; and that will qualify the nature of his possession, so that it cannot be said he has the sole possession of the specific effects or the debts, to bring it within the doctrine of reputed ownership." *Ex parte*

Williams, 11 Ves. 6. But see and consider *Ex parte Taylor*, Mont. Rep. 240. There one of four partners having died, and the surviving partners having compromised and obtained securities for a debt due to the original firm, became bankrupts, it was held by Sir L. Shadwell, V.C., that the securities were, by reputed ownership, distributable among the creditors of the three.

If a partner who, upon retiring from the partnership, desires that the partnership effects should remain liable to the joint debts of the partnership, he should assign such effects upon trust to pay the debts. See *Ex parte Fell*, 10 Ves. 348.

Although the joint effects of the partnership may, by assignment to one of the partners, be rendered his separate property so as to give his separate creditors a prior claim upon them, nevertheless the joint creditors may *before* his bankruptcy elect to become his separate creditors, though they cannot do so afterwards. "The engagement of one partner with the other," says Sir John Leach, V.C., "to pay the debts of the firm, can, as to the creditors of the firm, be considered only as a proposal that he is willing to become their sole debtor. If they accede to this proposal before the bankruptcy, then a contract to that effect is concluded, and under the bankruptcy they are his separate creditors. But their acceptance of him as their separate debtor, *after* the bankruptcy, comes too late, for he is then incapable of contract. . . .

I agree that it may be some hardship upon joint creditors, that the joint stock to which they may have given credit, should, by the dealings of their debtors with each other, be thus converted into separate estate. That hardship would have been avoided if it could have been held that where, upon a dissolution, one of two partners is to become the sole owner of the joint stock, and it is a part of the consideration that he shall pay the joint debts, such joint stock shall not, in bankruptcy, be considered as actually converted into his separate estate, unless he has paid the joint debts. The cases of *Ex parte Ruffin*, and the other cases of that class which followed it, have established that the legal principle which converts the joint estate into the separate estate by mere force of the contract is too strong for this equity." *Ex parte Freeman*, Buck, 473; see also *Thompson v. Percival*, 5 B. & Ad. 925; 3 Nev. & Man. 167.

But although the partnership effects have been made by contract the separate property of one of them, and therefore cannot be touched in bankruptcy by the joint creditors, the joint creditors may undoubtedly proceed against the two partners, for the agreement to dissolve does not deprive the joint creditors of their right of applying for payment to those who

are responsible to them. *Ex parte Peake*, 1 Madd. 358, 359.

2. *Transfer in order to convert joint into separate Property must be bona fide.*—In order that the joint property should be converted into separate property, the transaction must be *bona fide*. As Lord Eldon observed in the principal case, "a *bona fide* transmutation of the property is understood to be the act of men acting fairly, winding up the concern."

In case of fraud or collusion between the partners, the property of the partnership would not be withdrawn from the joint creditors. *Anderson v. Maliby*, 4 Bro. C. C. 423; 2 Ves. Jun. 244.

In the principal case the assignment took place a considerable time, a year and a half, before the bankruptcy, and that lapse of time was no doubt evidence of the *bona fides* (see *Ex parte Williams*, 11 Ves. 4); but the mere happening of the bankruptcy immediately after the assignment will not of itself, in the absence of fraud, render the assignment invalid. *Ex parte Snow*, 1 Cooke's Bank. L. 537.

Indeed an assignment upon a dissolution may be valid if no fraud were intended, although the partners knew the partnership was at the time insolvent. *Ex parte Peake*, 1 Madd. 346.

EX PARTE ROWLANDSON.

—◆—

De Term. S. Hilarii, 1785.

[REPORTED 3 P. WMS. 405 ; S.C. 2 EQ. AB. 110, PL. 2.]

BANKRUPTCY—DOUBLE PROOF.—*If A. and B. are bound in a bond jointly and severally to J. S., he may elect to sue them jointly or severally ; but if he sues them jointly he cannot sue them severally, for the pendency of one suit may be pleaded in abatement of the other. By the same reason, if A. and B., joint traders, become bankrupt, and there are joint and separate commissions taken out against them, and A. and B. before the bankruptcy become jointly and severally bound to J. S., J. S. may choose under which commission he will come, but shall not come under both.*

If two joint traders owe a partnership debt, and one of the partners gives a bond as a collateral security for payment of this debt, here the joint debt may be sued for by the partnership creditor, who may likewise sue the bond given by one of the traders.

The case was, John Crossfield and James Birket were partners in trade, and bound *jointly and severally in their joint and several bond* to the petitioner Rowlandson.

On the 27th of October, 1734, a joint commission was awarded against Crossfield and Birket, who were found bankrupts, and their estate and effects made over to the assignees, in trust for their creditors.

Afterwards a separate commission was sued out against each of the partners, and each upon this commission was also found a bankrupt.

The petitioner proved his debt under all three commissions, and received a dividend under the joint commission of — shillings in the pound ; and having also applied to the commissioners under each of the separate commissions, to be let into his dividend under

such separate commission, and being by them refused, in regard of his having received the same under the joint commission, he now applied to the Lord Chancellor to be admitted to receive his dividend under the separate, as well as under the joint commissions.

The Lord Chancellor (Lord Talbot) at first inclined to think, that the petitioner being a joint and a separate creditor, ought to be at liberty to come in under each of the commissions, provided he received but a single satisfaction; but the next day his Lordship held, that as at law¹ when A. and B. are bound jointly and severally to J. S., if J. S. sues A. and B. severally, he cannot sue them jointly; and on the contrary, if he sues them jointly, he cannot sue them severally, but the one action may be pleaded in abatement of the other. So; by the same reason, the petitioner in the present case ought to be put to his election, under which of the two commissions he would come; and that he should not be permitted to come under both; for then he would have received more than his share; but his Lordship said he would hear counsel, if they had anything to object against this order.

Argument for the petitioner.

Whereupon it was now offered, that it was true, if at law two men are bound jointly and severally in a bond to J. S., the obligee may either sue the bond jointly against both, or severally against each, at his election; but on his suing them jointly and severally at the same time, the pendency of one suit may be pleaded in abatement to the other; but the reason of this is, for that if the obligee sues the obligors jointly and recovers judgment, the plaintiff in such case is at liberty to take as well the joint, as the separate effects of each of the obligors in execution. Now, in such case, he can have no more than all the effects of each, consequently during such joint suit it would be fruitless, and indeed vexatious, to bring a separate action against each of the obligors; but that nothing could be inferred from hence against a joint creditor's taking under each of these commissions the utmost advantage allowed him by law; and that the bankruptcy of the debtor ought not to hinder him of such advantage, so as he did not receive a double satisfaction.

For the which purpose a case was cited (*Ex parte Rice Vaughan*) as determined by the Lord King, September 6, 1732, where a

¹ If three are bound jointly and severally, the obligee cannot sue two of them jointly, for this is suing them neither jointly nor severally. *Roll. Abr.* 148.

joint commission issued *versus* Stainer, Jones, and Prestland, who were partners and joint traders; and one Rice Vaughan proved a debt of £3251 under the commission, and received a dividend of 4s. in the pound. Afterwards Rice Vaughan, having likewise a separate bond from Stainer for the same debt, sued out a separate commission for it against Stainer, and petitioned that the commissioners and assignees under the joint commission might deliver up the separate effects of Stainer, in order that the petitioner might receive a further satisfaction towards his debt out of Stainer's separate estate. On the other hand the joint creditors petitioned, that the separate commission might be superseded, forasmuch as Rice Vaughan, on whose petition the separate commission had issued, had been allowed for the same debt under the joint commission, viz. 4s. in the pound. But it was ordered, that the assignees under the joint commission should deliver up the separate effects of Stainer, to the end that they might be applied to pay the separate bond. And it was insisted that this was a case in point; for here Rice Vaughan was a joint creditor of *all* the partners, and also a separate creditor of *one*, and had proved his debt, and taken his dividend under the joint commission; notwithstanding which he was allowed relief as a separate creditor for the same debt.

Lord Chancellor *Talbot* said, he observed this difference between the cases. In that which had been cited, there was a single bond given as a collateral security for the same debt, by one of the partners only; but in the principal case, the bond upon which the petitioner would seek relief under the separate commission, was not only for the same debt, but given by both the parties; and the plea in abatement would have been proper, had the bond been sued at the same time both as a joint and several bond, which cannot be, where there is only a separate bond. Then taking this to be the rule at law, that a joint and several bond cannot be sued at one and the same time, both jointly and severally, but that the obligee must make his election; so it ought to be (he said) in the principal case. And this would best answer the general end of the statutes concerning bankrupts, which provide, that all debts shall be paid equally, as in conscience they are all equal; that it is upon this foundation that debts of a partnership have been ordered to be first paid out of the partnership effects (see *Horsey's* case, 3 P. Wms. 23), and that afterwards the joint creditors, when the separate creditors are satisfied, may come in upon the separate effects, but not before; and so *vice versâ*, the separate creditors are

to come in first on the separate effects of the partners, and if these are not sufficient, then on the joint effects, after the partnership creditors are paid.

And therefore, that there might be an equality in the principal case, his Lordship ordered, that the petitioner should make his election, whether he would come in for a satisfaction out of the partnership, or the separate effects, but not out of both at the same time; however, his having received his dividend out of the joint effects, on the joint commission, whilst this matter was in suspense, was not to bind him; and provided he brought that back again, he might come in for a satisfaction out of the separate effects.

In the often-cited and leading case of *Ex parte Rowlandson*, Lord Talbot lays down the well-known rule as to the mode in which on the bankruptcy of a firm the joint property of the firm, or the separate property of its various members, is to be distributed amongst the joint and separate creditors, viz. the debts of a partnership (that is to say, the joint debts) will be ordered to be paid first out of the partnership or joint effects, and afterwards the joint creditors, when the separate creditors are satisfied, may come in upon the separate effects, but not before; and so *vice versa*, the separate creditors are to come in first on the separate effects of the partners, and if these are not sufficient, then on the joint effects, after the partnership or joint creditors are paid. *Ante*, p. 364.

The question, however, which arose for the decision of Lord Talbot was whether when a creditor has a security which is both *joint* and *several* he has a right to a double proof, that is to say, whe-

ther he may prove at the same time against the joint and separate estates, or whether he must elect against which of the estates he will proceed. Lord Talbot ultimately, though evidently after considerable doubt and hesitation, determined that the creditor was bound to make his election.

How far this decision is founded upon correct principles will be hereafter considered; it is proposed however in discussing the doctrines laid down in the principal case, and with a view to their elucidation, to make a few observations under the following heads:—*First*, what is joint and what is separate estate. *Secondly*, what are joint and what are separate debts. *Thirdly*, as to the right of proof generally. *Fourthly*, as to election of proof. *Fifthly*, as to double remedy and double proof. *Sixthly*, as to proof between partners. *Seventhly*, as to proof between estates. *Eighthly*, as to contribution between estates.

1. *What is joint and what is*

separate Estate.—Joint estate is that in which the partners are jointly interested for the purposes of the partnership, at the time of the bankruptcy. Separate estate is that in which the partners are each separately interested at the time of the bankruptcy. Coll. Partn. 595, 2nd ed.

Partners may by their articles of partnership agree what shall be joint and what shall be separate estate. *Ib.* 596.

What was made joint estate by any such agreement will remain such unless it be considered to be separate estate by coming within the reputed ownership clause of the Bankrupt Law Consolidation Act (12 & 13 Vict. c. 106, s. 125). But that will not be the case where after a dissolution the partnership effects are in the actual possession of one of the partners for the purpose of winding up the affairs of the partnership. See *Ex parte Williams*, 11 Ves. 6.

Where however upon a dissolution of a partnership a dormant partner allows the joint effects to be in the possession, order, and disposition of the ostensible partner, on the bankruptcy of the latter (*Ex parte Enderby*, 2 B. & C. 389; 3 Dowl. & Ry. 636, overruling *Coldwell v. Gregory*, 1 Price, 119), even although there may have been an assignment upon trust to pay the partnership debts (*Ex parte Dyster*, 2 Rose, 256; *Ex parte Barrow*, *ib.* 252), the whole of the effects will pass to the assignees. See also *Smith v. Watson*, 2 B. & C. 401; 3 Dowl. & Ry. 751;

Ex parte Chuck, Mont. 364, 457; 8 Bing. 469; Coll. Partn. 598.

Where traders in co-partnership having admitted a dormant partner, and his share in the joint stock being in the order and disposition of the ostensible partners, was distributable as such, it was held that the creditors of the new firm and the creditors of the old firm, who had notice that a dormant partner had been admitted, were entitled to prove their debts, *pari passu*, with the other creditors of the old firm. *Ex parte Chuck*, Mont. Rep. 364, 457; 8 Bing. 469.

Whatever is agreed by the partners to be separate estate will continue to be such (*Smith v. Smith*, 5 Ves. 189; 1 Hov. Supp. 502; *Ex parte Smith*, 3 Madd. 63; Buck, 149), unless when it consists of goods and chattels it is in the reputed ownership of the firm at the time of the bankruptcy, and in that case it will be considered as joint estate. *Ex parte Hare*, 2 Mont. & A. 478; 1 Deac. 16; *Ex parte Smith*, 3 Madd. 63; Buck, 149; *Ex parte Hunter*, 2 Rose, 382; *Ex parte Jackson*, 1 Ves. 131; *Horn v. Baker*, 9 East, 215; *Ex parte Parry*, 5 Ves. 575; *Ex parte Brown*, 6 Ves. 136; *Ex parte Arbouin*, 1 De Gex, 359.

Whatever is converted into separate estate, and is no longer in the order and disposition of the partnership, is separate estate under the bankruptcy. Coll. Part. 603, 2nd ed.; and *Ex parte Ruffin*, and note, *ante*, p. 346; *Ex parte Wood*, 1 De Gex, 134.

2. *What are joint and what are separate Debts.*—Separate debts have been defined to be those for which the creditor can have his remedy at law, not against the whole firm, but against that partner only who contracted them; joint debts to be those for which an action, if brought, must be brought against all the partners constituting the firm. Coll. Partn. 613, 2nd ed.

Without going into the question as to the joint and several liabilities of partners, which constitute joint and several debts, and which have already been noticed at some length (*ante*, p. 265), it may be here remarked, that upon the bankruptcy of a firm or an individual member of it, an important question sometimes arises, viz. whether a joint may not have been converted into a several debt, or, on the other hand, a several into a joint debt, for there is no doubt but that this may be done by the assent of all the parties. *Ex parte Slater*, 6 Ves. 146; *Ex parte Clowes*, 2 Bro. C. C. 595; *Ex parte Bonbonus*, 8 Ves. 546. Of course the best evidence of an intention to convert is by an instrument in writing, and if it imposes any terms upon the creditor, he must show that they have been complied with. *Ex parte Fairlie*, Mont. 17.

A parol agreement however, or conduct from which an agreement may be inferred, is sufficient to effect a conversion, and also to extinguish the original obligation. See *Ex parte Lane* (1 De Gex, 300; 10 Jur. 382; 16 L. J. Bank. 4);

there a father and son trading together in partnership became bankrupts. A debt had been due from the father alone to the petitioner, but from the evidence it appeared that at the formation of the partnership all parties considered that the firm became liable to pay the debts, that one of the bankrupts told the petitioner so, and that she assented, and that subsequent transactions proceeded on that footing. It was held by Sir *J. L. Knight Bruce*, C. J., that the separate debt of the father was converted into a joint debt of the firm. "If," said his Honour, "A. be a creditor of B., and B. and C. pur-
pose to enter into, or have entered into partnership, and say to A. 'we wish this debt to be a debt from us both and we will pay it,' and A. accedes to that, although there is no writing, the agreement is valid and effectual, and is not impeached or affected by the Statute of Frauds. The effect of such an agreement is to extinguish the first debt, and for a valuable consideration to substitute the second debt. These very words need not be used by the parties, if there is sufficient to show that the intention was so; that will be as effectual as if the most formal expression had been given to the intention." See also *Ex parte Jackson*, 1 Ves. Jun. 131; *Ex parte Peele*, 6 Ves. 602; *Ex parte Bonbonus*, 8 Ves. 540; *Ex parte Williams*, Buck, 13; *Ex parte Clowes*, 2 Bro. C. C. 595; *Ex parte Kedie*, 2 Deac. & C. 321.

The better opinion appears to be that a creditor who seeks to

show conversion of a debt, must prove that he gave his assent before the bankruptcy. See *Ex parte Fry*, 1 Glyn & J. 96; *Ex parte Hunter*, 1 Atk. 223; see, however, and consider the case of *Ex parte Freeman*, Buck, 471, where the decision of Sir John Leach, V.C., was overruled by Lord Eldon, C.

Evidence may, however, be given to show that a bill given in the name of the partnership, was intended only to be a collateral security for a separate debt, and not in discharge of it, and in such case the remedy against the separate estate will remain. Thus in *Ex parte Seddon*, 2 Cox, 49, the petitioners had sold goods to one of the bankrupts, which were paid for by a joint note, and a receipt was given by the petitioners as for money paid, not expressing the payment to be made in the manner it really was. It was held by Lord Thurlow, C., that the petitioners had not accepted the security of the joint note in full satisfaction of the debt, so as to preclude their coming on the separate estate. "To be sure," said his Lordship, "on the face of the note it is a joint debt, but the question is whether the creditor may not maintain his debt for the goods sold and delivered; that is, does the note extinguish the debt? If it had been a bond instead of the note, it would clearly have done so; but the note was no payment; and then, as to the receipt, if it had remained unexplained, it would have been evidence of the debt

being paid; but when it appears how the receipt happened to be given, it is not conclusive. I think this may be proved as a separate debt." See also *Ex parte Lobb*, 7 Ves. 592; *Ex parte Meinhertzhagen*, 3 Dea. 101; *Ex parte Roxby*, 1 Mont. Part. 124; *Ex parte Hay*, 15 Ves. 4.

Upon the same principle a joint debt will not necessarily be converted into a separate debt, by the creditor taking a separate security. Thus in *Ex parte Hodgkinson*, Sir Geo. Coop. Rep. 99, the question arose whether a joint debt was converted into a separate debt by the creditor taking a separate security, namely, bills drawn by one of the partners, which was never paid. Lord Eldon said, "I think that in this case the bills were taken as a mode of satisfying the debt, and not in discharge of it, and they not having been paid when due, the so taking them goes for nothing."

The question as to whether a debt has been converted with or without extinguishment is of some importance, for if a debt has been converted, and the original obligation has been extinguished, the creditor can only prove for the debt so converted whether it be joint or separate, but if a debt be converted without extinguishment then the creditor can proceed against either the joint or separate estate, for he must, in general, as will hereafter be more fully stated, be put to his election against which estate he will proceed.

3. *As to the Right of Proof generally.*—The rule laid down in the principal case, viz., that the joint estate of partners is on their bankruptcy applicable to the joint debts, and the separate estate to the separate debts, and the surplus of each is to come in reciprocally to the creditors remaining upon the other, has, with the exception of Lord *Thurlow* in some cases (*Ex parte Hodgson*, 2 Bro. C.C. 5; *Ex parte Page*, ib. 119; *Ex parte Flintum*, ib. 120; *Ex parte Copland*, Cooke's Bank. Law, 262) been approved of and followed by subsequent judges. See *Twiss v. Massey*, 1 Atk. 67; *Ex parte Cook*, 2 P. Wms. 500; *Ex parte Olaj*, 6 Ves. 813; *Dutton v. Morrison*, 17 Ves. 206; *In re Plummer*, 1 Ph. Ch. Ca. 56, 60.

The rule is the same, whether the fiat be joint or separate. When the fiat is joint the separate creditors may, under Lord *Loughborough's* General Order (Ord. Mar. 1794), prove their debts, and receive dividends out of the separate estate,—that order directing that distinct accounts shall be kept of the joint and separate estates respectively. So when the fiat is separate, and the assignees get possession of the joint property, the Court, upon the petition of the joint creditors, will order the assignees to keep distinct accounts of the separate and joint estate, and apply them to the payment of the separate and joint debts respectively, as when separate creditors prove under a joint fiat. Coll. Partn. 624.

The reason for the rule appears to be founded upon the supposition, that credit was given by each class of creditors to that fund which is primarily liable to their demands. "Joint creditors," says Lord *Hardwicke*, C., "as they gave credit to the joint estate, have first their demand on the joint estate; and separate creditors, as they gave credit to the separate estate, have first their demand on the separate estate." *Twiss v. Massey*, 1 Atk. 67.

Although the rule is well established, the reasoning by which it is supported has been often condemned as alike artificial and contrary both to the doctrines of common law, and the dictates of common sense.

Lord *Thurlow*, who, as we have before seen, adopted a course different from that laid down in the rule just referred to, held "that a commission of bankruptcy was an execution for all the creditors, and as the assignees under a separate commission might possess themselves not only of the separate estate, but of the bankrupt's proportion of the joint estate, and as a joint creditor having brought an action and recovered judgment against all his debtors, might have several executions against each, therefore the bankruptcy preventing his action with effect, should be considered a judgment for him as well as the others; and, consequently, that no distinction ought to be made between joint or separate debts, but that they ought all to be paid rateably out of the bankrupt's property, which was com-

posed of his separate estate and his moiety or other proportion of the joint estate." Gow, Partn. 312; *Dutton v. Morrison*, 17 Ves. 207.

It is true that the doctrine and reasoning of Lord *Thurlow* have not hitherto prevailed; the exceptions however to the rule established in opposition to them, may of themselves well lead us to doubt of its soundness.

These exceptions are three in number, and according to them a joint creditor may, in certain cases, prove against the separate estate *pari passu* with the separate creditors.

First. Where a joint creditor is petitioning creditor under a separate petition, he is considered as a separate creditor, and can come in with the separate creditors and receive dividends with them. The reason given for this exception is, that "as the order made upon the petition is in the nature of an execution for a legal debt, all the consequences attached to that must follow, and they must take their legal dividends." *Ex parte De Tastet*, 1 Rose, 11; *Ex parte Hall*, 9 Ves. 349; *Ex parte Ackermann*, 14 Ves. 604.

It is moreover immaterial that the joint debtor has also a separate debt sufficient to support the petition. *Ex parte Burnett*, 2 M. D. & De G. 357. Where, however, a joint creditor presents a petition against A. "as surviving partner of B.," he can claim only against the joint estate, for in such case the proceedings amount to "a sta-

tute execution against joint and separate estate, and the petitioner a joint creditor must claim against the joint estate." *Ex parte Barned*, 1 Glyn & J. 309, 311.

Secondly. Where there is no joint estate and no living solvent partner, the joint creditors may prove against the separate estate (*Ex parte Sadler*, 15 Ves. 52; *Ex parte Machell*, 2 V. & B. 216; *Ex parte Wylie*, 2 Rose, 393), notwithstanding the estate of a deceased partner may be solvent (*Ex parte Bauerman*, 3 Deac. 476). This exception will not be applicable, and joint creditors will not be allowed to prove against the separate estate if there be joint property, however small in amount it may be, even to the amount of five pounds or five shillings, according to Lord *Eldon*. See *Ex parte Peake*, 2 Rose, 54; *In re Lee*, ib. note. The joint property, however, must be such as can be reached by the Court, for "if," as observed by Lord *Eldon*, "the joint property be of such a nature and in such a situation that any attempt to bring it within the reach of the joint creditors must be deemed desperate, or in point of expense an unwarrantable attempt, there would in truth be no joint property." *Ex parte Peake*, 2 Rose, 54; *Ex parte Kennedy*, 2 De G. Mac. & G. 228; *Ex parte Hill*, 2 Bos. & P. N. R. 191 n.; *Ex parte Leaf*, 1 Deac. 176. *In re Lee and Armstrong*, 2 Rose, 54. But a person will not be precluded from proving against the separate estate, by his having had pledged with him by the partners some

goods belonging to the partnership, which when sold are insufficient to satisfy his debts. For by the term "joint effects" in the exception to the general rule, is meant such effects as are under the administration of assignees to distribute, and not such as were pledged by the partners to more than their value. See *Ex parte Hill*, 2 Bos. & Pull. N. R. 191 n.

Again, if there be a solvent partner, a joint creditor cannot prove against the separate estate (*Ex parte Kensington*, 14 Ves. 447; *Ex parte Janson*, 3 Madd. 229; Buck, 227), except where a solvent partner cannot be reached, as when he is abroad, and not likely to return. *Ex parte Pinkerton*, 6 Ves. 814 note. Mere insolvency, however, of a copartner does not, as his bankruptcy would do, entitle the joint creditors to prove upon the separate estate of the bankrupt partner, the principle being, that whilst there is any other fund, however small, to resort to, the joint creditors cannot prove against the separate estate of one of the partners who has become bankrupt. Per Sir John Leach, V.C., in *Ex parte Janson*, 3 Madd. 231.

Thirdly. Where there are no separate debts, or if, although there are separate debts, a joint creditor pays them all, all the joint creditors may prove against the separate estate. *Ex parte Chandler*, 9 Ves. 35; *Ex parte Hubbard*, 13 Ves. 424; *Ex parte Taitt*, 16 Ves. 193.

Having noticed these rules respecting the proof in order to ob-

tain a dividend, it should be remembered that 12 & 13 Vict. c. 106, s. 140, enacts, "That if one or more of the partners of a firm be adjudged bankrupt, any creditor to whom the bankrupt is indebted jointly with the other partners of the firm, or any of them, shall be entitled to prove his debt, *for the purpose only* of voting in the choice of assignees, and of being heard against the allowance of the bankrupt's certificates, or of either of such purposes; but such creditor shall not receive any dividend out of the separate estate of the bankrupt, until all the separate creditors shall have received the full amount of their respective debts."

4. *As to Election of Proof.*—In the principal case it was decided that where all the partners are bankrupt, and the creditor has taken a *joint and several* security of the partnership for the debt, he must elect whether he will proceed, in the first instance, against the joint or separate estate.

And when he has once made this election, he is excluded from any dividend from the other estate, unless there remains a surplus after the discharge of all debts having a preference thereon. Stor. Partn. § 384.

Lord Talbot, it will be observed, went upon the analogy to the rule according to which a person having a joint and several bond could not sue the debtor at one and the same time, both jointly and severally, but must make his election. In

fact, as at law, when A. and B. are bound jointly and severally to J. S., if J. S. sues A. and B. severally, he cannot sue them jointly; and on the contrary, if he sues them jointly, he cannot sue them severally, but the one action may be pleaded in abatement of the other; so according to the same reason the petitioner in the principal case having a joint and several security, he was bound to make his election, under which of two commissions he would come.

Lord *Eldon* on several occasions showed his disapprobation of the reasoning of Lord *Talbot* in the principal case (9 Ves. 225; 10 Ves. 109); and its fallacy has been well exposed in a recent judgment by Mr. Commissioner *Hill*.

"It is difficult," he observed, "to believe that so eminent a person as Lord *Talbot* should have supposed any just analogy to exist between the two cases. For the obligee of a bond who has brought a joint action against obligors is precluded from harassing them with separate actions, because on obtaining judgment in his first suit he is entitled to satisfy the debt out of the separate as well as the joint property of the obligors. His rights therefore are not narrowed, but he is precluded from oppressing the defendants with costs occasioned by an unnecessary multiplication of remedies." *Ex parte The Bank of England*, 32 L. T.

Lord *Eldon*, on the other hand, is reported to have derived the rule in bankruptcy from a desire of the Court to restrain attempts on the part of firms to give an air of re-

spectability to their bills by classifying their partners, so that one set should draw upon another, as if the two sets were independent houses. *Ex parte Bigg*, 2 Rose, 38.

Unsatisfactory as these reasons may be, the rule acted upon by Lord *Talbot* in the principal case as to election of proof in the case of a creditor of a firm having a joint and several security is well established (*Ex parte Bond*, 1 Atk. 98; *Ex parte Parminter*, *Ex parte Abingdon*, *Ex parte Banks*, cited *Ib.*), and, as will be hereafter seen, it is doubtful whether certain exceptional cases in which double proof has been allowed will now be followed. See *Ex parte Goldsmid*, 1 De G. & Jo. 257; and *post*, p. 377.

It has moreover been laid down that in order to put a creditor, having a joint and several security, to his election, it is immaterial whether the security arises from the same or different instruments. *Ex parte Bevan*, 9 Ves. 225; *Ex parte Barnewall*, 6 De Gex, Mac. & G. 795, 800.

Upon the same principle, when one of the members of a firm draws a bill of exchange upon the firm, and it is accepted by them, the holders at all events, if they were aware at the time of the taking the bill, of the relation between the drawer and the firm, will be obliged to elect between proof against the joint estate of the firm or the separate estate of the individual partner (see *Ex parte Bigg*, 2 Rose, 37), and although it might be inferred from what Lord *Eldon* says in *Ex parte Bigg*, and also in *Ex parte Bank of England*, 2 Rose, 82,

that double proof would be allowed under such circumstances where the holders of the bills were ignorant that the drawer was a member of the firm, in a different report of *Ex parte Bigg* he does not appear to have laid down any such distinction (1 Mont. Part. 125). See also *Ex parte Liddiard*, 2 Mont. & A. 87; 4 Deac. & Ch. 603.

Where a joint has been converted into a separate debt, or, *vice versa*, a separate into a joint debt, in such a manner as that the previous debt is extinguished, the creditor can only prove for the debt according to its new quality (Coll. Partn. 637, 2nd ed.); but where a conversion of the debt has taken place *without* extinguishment (*Ex parte Hay*, 15 Ves. 4; *Ex parte Rozby*, 1 Mont. Part. 124; *Ex parte Hodgkinson*, Sir G. Coop. 101; *Ex parte Seddon*, 2 Cox, 49; *Ex parte Lobb*, 7 Ves. 592; *Ex parte Meinertzhagen*, 3 Dea. 101), and, *a fortiori*, when the creditor assents to an arrangement on the part of the debtors without taking a new security (*Ex parte Clowes*, 2 Bro. C. C. 595; *Ex parte Apsey*, 3 Bro. C. C. 265; *Ex parte Freeman*, Buck, 471; *Ex parte Fry*, 1 Glyn & J. 96), he may prove either according to the old or the new quality of the debt.

Where an individual member of a firm has, by means of collusion with his partners, converted a separate debt due from himself into a joint debt, the debt may be proved against either the joint or the separate estate. Thus, if with the knowledge of the firm of which he is a member, a trustee (*Ex parte*

Watson, 2 V. & B. 414; *Ex parte Heaton*, Buck, 386; and see *Keble v. Thompson*, 3 Bro. C. C. 112; *Ex parte Beilby*, 1 Glyn & J. 167) or assignee of a bankrupt (*Smith v. Jameson*, 5 T. R. 601) applies the funds entrusted to him in his fiduciary capacity to the use of the firm, proof may be made either against the joint or separate estate.

But if the rest of the firm were not aware of the misapplication of the trust funds, the debt does not become joint, and proof can only be made against the separate estate. *Ex parte Apsey*, 3 Bro. C. C. 265. In *Ex parte Turner* (Mont. & Mac. Arth. 255), A. had employed B. and C. as his stock-brokers, and, for the purpose of more convenient transfer, allowed certain stock belonging to him to stand in the name of B. alone. B., without the consent or knowledge of A., sold this stock, and paid the produce into the partnership funds of B. and C. B. and C. having afterwards become bankrupts, it was held by Sir L. Shadwell, V.C., that A. was entitled to prove against the separate estate of B. or against the joint estate of B. and C. See also *Ex parte Hinds*, 3 De G. & Sm. 613.

When a person deals with another, not knowing that he has with him in his business a dormant partner, he may, with reference to a debt which thus becomes due to him, elect to prove either against the joint estate of the firm or the separate estate of the ostensible partner. *Ex parte Norfolk*, 19 Ves. 458; and see and consider *Binford v. Dommett*, 4 Ves. 756; *Ex parte Hamper*, 17 Ves. 412;

Ex parte Watson, 19 Ves. 459;
Ex parte Matthews, 3 V. & B. 125;
Ex parte Hodgkinson, Sir G. Coop.
 101.

Where a joint commission issued against A. and B., A. being a dormant partner, and the joint creditors had resorted to the separate estate of B., thereby diminishing that separate estate, and exonerating the joint estate of A. and B. so as to produce a surplus of it, it was held by Lord *Eldon*, C., that the separate creditors of B. had a lien upon that surplus to the extent which their funds had been diminished by the resort of the joint creditors. *Ex parte Reid*, 2 Rose, 84.

Although "the Court will undoubtedly never suffer a creditor to split a demand, and prove part of it under the commission, and prosecute, at the same time, a bankrupt for the remainder at law" (*Ex parte Matthews*, 3 Atk. 816; and see *Ex parte Crinsoz*, 1 Bro. C. C. 270), nevertheless where a debt due from a partnership is secured as to part by a joint security, and as to the rest by a joint and separate security, the creditor may prove the former part against the joint estate, and the latter against the separate estate. Thus, in *Ex parte Ladbroke*, 2 Glyn & J. 81, where a debt of £27,620. 19s. 10d. was due from the bankrupts at their bankruptcy to their bankers, on a balance of account, and such balance was covered by joint promissory notes of the bankrupts to the extent of £18,000, and also by a mortgage of some property belonging to one of the bankrupts, with joint and

several covenants from each of them for the payment of the whole balance; and part of the debt, to the amount of £17,000, had been permitted to be proved by the bankers against the joint estate, it was held by Lord *Eldon*, C., that the bankers were entitled to a proof of the £18,000 against the joint estate, and to prove the residue against the separate estate of one of the bankrupts. See also *Ex parte Bate*, 3 Deac. 358.

Upon the same principle, where the separate debt of one partner is secured as to part of it by the joint security of the firm as sureties, the creditor may prove as to the latter part against the firm, and as to the rest against the separate estate of the individual partner. In *Ex parte Hill* (3 Mont. & A. 175), a partner covenanted to pay £4000 to the trustees of his marriage settlement by instalments, and assigned £3000 of his portion of the partnership capital to them as security. The firm gave the trustees credit £3000 in their books, and wrote to them, stating that they had done so. The firm became bankrupt before the first instalment was due. It was held that the £3000 might be proved against the firm, and £1000 against the separate estate of the covenantor. See also *Ex parte Smith*, 1 Deac. 385.

Where a joint and separate creditor makes his election as to whether he will, in the first instance, be a joint or separate creditor, he is entitled to no other advantage over other creditors. For instance, if he elects to go in the first in-

stance against the joint estate, he will have no preference to the other joint creditors. *Ex parte Bevan*, 10 Ves. 107.

A person who is a joint and several creditor is entitled to look into the accounts of the joint and several estates, in order that he may see against which estate it will be most beneficial for him to prove in the first instance (*Ex parte Bond*, 1 Atk. 98; *Ex parte Husbands*, 2 Glyn & J. 4; *Ex parte Bentley*, 2 Cox, 218); and under special circumstances a creditor, even after the receipt of a dividend from one estate, will be allowed to waive his proof and prove against the other estate, upon his refunding the dividend (where he has received one) with interest. This he will be allowed to do when the first proof has been made in ignorance of his right to elect, or of the value of both funds (see *Ex parte Bond*, 1 Atk. 98; *Ex parte Masson*, 1 Rose, 159; *Ex parte Bolton*, 2 Rose, 389; *Ex parte Swanzy*, Buck, 7; *Ex parte Law*, 3 Deac. 541; *Ex parte Jones*, 15 Jur. 214; 20 L. J. Bank. 5); but waiver of proof will not be allowed so as to disturb any dividend already made (*Ex parte Bielby*, 13 Ves. 70); or where it would affect the certificate of the bankrupt, already signed by the creditor, by reason of the great amount of the debt (Coll. Partn. 643, 2nd ed.); but where the bankrupt's certificate would not be affected thereby, a waiver of proof will be allowed even after the creditor has signed the certificate. Coll. Partn. 643, 2nd ed. See how-

ever, and consider *Ex parte Solomon*, 1 Glyn & J. 25; *Ex parte Husbands*, 5 Madd. 421; 2 Glyn & J. 4.

Where a creditor, having a joint and several security, has once made his election, he will be excluded from any dividend from the other fund, unless there remains a surplus, after the discharge of all the debts, having a preference thereon. Stor. Part. § 598.

With reference to the election of remedy by a creditor, see 12 & 13 Vict. c. 106, s. 182; Coll. Partn. 680, 2nd. ed.; Shelf. Bank. 373.

5. *As to Double Remedy and Double Proof*.—It is a rule in bankruptcy, that if a creditor of a bankrupt holds a security on part of the bankrupt's estate, he is not entitled to prove his debt under the commission without giving up or realizing his security. This depends upon the principle in the bankrupt laws, that all creditors are to be put on an equal footing, and therefore if a creditor chooses to prove under the commission, he must sell or surrender whatever property he holds belonging to the bankrupt. See 1 Phil. Ch. Rep. 59; *Ex parte Grove*, 1 Atk. 103; Lord Loughborough's Order, 8th March, 1794.

Where, however, a creditor of a bankrupt has a security on the estate of a third person, that principle does not apply; and he is in that case entitled to prove for the whole amount of his debt, and also to realize the security, provided he does not altogether receive more than twenty shillings in the pound.

Thus in *Ex parte Parr*, 1 Rose, 76, the petitioners were holders of bills drawn by the firm of Brummel, Heyliger, & Co., and accepted by the bankrupts Leigh and Armstrong. The bills having become due, and the acceptors being unable to take them up, the petitioners resorted to the drawers; but it being inconvenient for them to pay, it was agreed between the petitioners and Brummel and Heyliger—two of the partners of the firm of Brummel, Heyliger, & Co., that they should assign to them a plantation in South America, as a security for the balance then owing upon the bills and the interest, which was accordingly done. A joint commission of bankrupt some time afterwards issued against Leigh and Armstrong. It was held by Lord Eldon, reversing the decision of the Commissioners, that the petitioners might prove the amount of the bills and interest without deducting the value of the security. "The deduction," said his Lordship, "of a security is never to be made in bankruptcy, but when it is the property of the bankrupt; it is said that it must be so considered in this case, as the House in Demerara and that in Liverpool were partners; but it is quite familiar that the same firm may be in one character drawers, and in another acceptors. . . . The Commissioners must call another meeting, the petitioners to prove without deducting their security." See also *Ex parte Bowden*, 1 D. & C. 135; *Ex parte Smyth*, 3 Deac. 597; *Ex parte Goodman*, 3 Madd. 373;

Ex parte Free, 2 Glyn & J. 250; *Ex parte Rodgers*, 1 Deac. & Ch. 38; *Ex parte Davenport*, 1 Mont. D. & D. 313; *Ex parte Adams*, 3 Mont. & A. 157; *Ex parte Groom*, 2 Deac. 265. Sed vide *Ex parte Connell*, 3 Deac. 201; 3 Mont. & A. 581.

As in administration under bankruptcy, the joint estate and separate estate are considered as *distinct* estates, it has accordingly been held, that a joint creditor, having a security upon the separate estate, is entitled to prove against the joint estate, without giving up his security. *Ex parte Peacock*, 2 Gl. & J. 27; *Ex parte Bowden*, 1 Deac. & Ch. 135; *In re Plummer*, 1 Phil. Ch. Rep. 56, 60.

Where a joint debt is due from two partners, and a commission issues against one of them, the creditor can prove his debt under the commission, and also sue the other partner. *Heath v. Hall*, 4 Taunt. 326, 328.

We have before seen in which cases a creditor having a joint and several security of a firm will be put to his election of proof. (See *ante*, p. 371.)

In some cases, however, in which there has been an aggregate firm, and a distinct trade has been carried on by some or one of the members of the firm, creditors to whom both the aggregate firm and the minor firm, or the individual partner carrying on a distinct trade, have been liable, have been admitted to prove against the estates both of the aggregate firm and of the minor firm or individual partner carrying on the distinct trade. It seems however

that double proof was admitted in the early cases only *where the creditor was ignorant, at the time he took his security*, of the connections of the minor firm, or the individual partner carrying on the distinct trade with the aggregate firm. Thus it has been held that the holder of a bill drawn by one firm upon another distinct firm, consisting partly of the same members, was entitled to prove against both estates, if the holder took the bill *without notice* that the two firms consisted partly of the same members. See *Ex parte Laforest*, Cooke's Bankrupt Laws, 276; *Ex parte Benson*, ib. 278; *Ex parte Adam*, 2 Rose, 36; see also *Wickham v. Wickham*, 2 K. & J. 478.

But in subsequent cases, whether the creditor had notice of the connection between the aggregate firm and the members or member of it, carrying on the separate trade, seems to have been treated as of no importance, and whether there has been notice or not, double proof has been rejected. *Ex parte Moulton*, Mont. 321; Mont. & Bl. 28; *Re Vanzeller*, 1 Mont. & A. 345; *Ex parte Hinton*, De Gex, 550; *Ex parte Goldsmid*, 1 De G. & Jo. 257; *Re Whitwill*, 32 Law Times, 358; and see *Ex parte Bank of England*, 2 Rose, 82; *Ex parte Husbands*, 2 Gl. & Jam. 4.

In the recent case of *Ex parte Goldsmid*, 1 De Gex & Jo. 257, Lord Justice Turner, though evidently disapproving of the doctrine of disallowing double proof, considered himself bound by the authorities, and therefore followed them.

Lord Justice Knight Bruce how-

ever dissenting from the judgment of Lord Justice Turner, affirming the decision of the Court below, appears to have come to the conclusion, "*that in all cases, where there are dealings between trade and trade, whatever may be the connection of the partners, and whether the creditor has notice of the connection or not, a double proof ought to be allowed.*" An appeal in this case is now pending in the House of Lords.

The rule against double proof being of a technical character, and not approved of by the Courts, will not be extended to cases where the joint estate of partners is not being administered in bankruptcy. See *Ex parte Thornton*, 5 Jur. n.s. 212.

Should the House of Lords not feel itself competent on the appeal in *Ex parte Goldsmid*, on the face of so many decisions, to put the law upon this subject on a more satisfactory footing, by allowing double proof in all cases where a creditor has a joint and separate security, it would be well if the legislature took not only the rules relating to election and to double proof, but also the whole subject, with reference to the rights of joint and separate creditors upon the joint and separate estates of bankrupts, into its consideration. The present unsatisfactory state of the law has been recently very ably exposed by Mr. Commissioner Hill, in a judgment already referred to. In accounting for the rule laid down in the principal case, with regard to election of proof, the learned Commissioner observes:—
"To me it seems that the rule in

question is the natural, if not the necessary, corollary of another rule so well established as that no doubt has ever been thrown upon it, so far as I am aware, from the earliest times of bankruptcy. The rule to which I now advert prescribes that a joint debt shall be proved against the joint estate only, and a separate debt against the separate estate, unless in cases of surplus, a contingency into which I need not enter. Here, I apprehend, was the first departure from the principles of justice and English law. Why should bankruptcy vary the rights of creditors to a greater extent than is rendered inevitable by the necessity of the case, *i. e.* to accept satisfaction for their debts out of dividends which may, and, in the vast majority of instances, do fall short of payment in full? But if the principle involved in this query had been observed, the claim of the joint creditors of A. and B. would have been, as well after bankruptcy as before, not confined to the joint estate, but would have extended to each of the separate estates; while, on the other hand, the creditors of A. would have had a right to prove not only against the separate estate of A., but on so much of the joint estate of A. and B. as was the fair share of A. If, then, no unnecessary change had been made, there would have been double proofs in every case, though of a different kind from the double proofs which have now and then been admitted as exceptions to the general rule prohibiting them. That the rule of prohibition works capriciously

and unjustly could not be doubted, even if it had not been universally condemned from the Bench. It is obvious that the creditor who furnishes goods to A. and B., and who therefore, according to common law and common sense, has the full responsibility of both debtors and all their estate, joint and separate, for the satisfaction of his debt, has placed himself in a safer condition than he who has been content to risk his property to the honesty or solvency of only one of these two debtors. Yet it often happens that the separate creditor of A. or of B. is paid a much larger dividend—sometimes to the full amount of his debt—while the joint creditor of A. and B. receives but a small pittance; and, as every departure from principle is the fruitful parent of similar aberrations, a subordinate rule has been established in cases in which A. and B. have no joint estate, permitting the joint creditors to prove against both the separate estates, so that it is often for the interest of the joint creditors that the joint estate should be *nil*; than which no imaginable position of the law can well be more absurd. Nor is justice done even in those cases in which double proof is admitted, because the creditor enjoying that privilege obtains an unjust preference over the separate creditor, inasmuch as he takes away a portion of the separate fund without, in return, permitting the separate creditor to share in so much of the joint estate as belongs to his particular debtor. I shall not then be deemed presumptuous, I hope, if I consider

the rule which restricts the joint creditor to the separate estate to have been derived from a jingle instead of resting upon a principle. Many a fallacy is of the same illegitimate birth. 'Joint creditor' and 'joint estate,' 'separate creditor' and 'separate estate' sound well, no doubt; yet I cannot but think that as the argument begins, so it ends, altogether in sound. Except in limited partnerships, which are of very recent introduction and are the creatures of statute, every joint creditor is until bankruptcy a joint and separate creditor, and every separate creditor has a right over so much of any property which his debtor holds jointly with another as would belong to the debtor upon a division. And while there appears to me no ground in justice for permitting bankruptcy to vary these rights, the change which has been made is, I must think, truly chargeable with all the complications of injustice resulting from attempts made by Courts of Equity to return, in particular cases, as nearly as they were able, to what would have been the universal state of things had the rule never been established." *Re Whitwill*, 32 L. T. 358.

6. *As to Proof between Partners.*
 --One partner can prove a debt due to him on the partnership account, upon a separate commission against another partner (*Ex parte Watson*, 4 Madd. 477; *Wood v. Dodgson*, 2 Mau. & Selw. 195; *Affalo v. Fourdrinier*, 6 Bing. 309), but he cannot prove in competition

with the partnership creditors, and it may be generally laid down that where either one member of a firm is indebted to the partnership or the partnership to one member of the firm, neither the partnership nor the individual member of the firm can prove against the separate estate in the one case or the joint estate in the other, in competition with the creditors. This subject was very fully discussed by Lord Thurlow, C., in the case of *Lodge v. Fendall* (cited 9 Ves. 589), where Dr. Fendall, one of the partners, was a creditor of the partnership of himself and Lodge the other partner, for advances to a large amount. They became bankrupts immediately after the formation of the partnership; and the advances of Dr. Fendall formed the joint estate to be divided. There was a struggle by Dr. Fendall to be admitted as a creditor for the amount of his advances as against the partnership. Lord Thurlow however, after full consideration, was of opinion that all the authorities establish this, that those who being in partnership are themselves or some of them debtors to the creditors of every class, cannot come into competition with the creditors. After their demands are liquidated finally the partners may be creditors upon each other, but not before. See also *Ex parte Reeve*, 9 Ves. 538; *Ex parte Ogle*, Mont. 350; *Ex parte Burrell*, Co. B. L. 528; *Ex parte Broome*, 1 Rose, 69; *Ex parte Rawson*, Jac. 274; *Ex parte Robinson*, 4 Deac. & C. 499; *M' Owen v. Hunter*, 1 Dru. & Walsh, 347; *Ex parte Hinds*, 3 De G. & Sm. 618.

If however a solvent partner who is a creditor of the firm, will pay joint creditors either the whole of what is due to them, or part of what is due to them in discharge of the whole, he may prove against the separate estate of his bankrupt partner in competition with the separate creditors. *Ex parte Moore*, 2 Glyn & J. 166; *Ex parte Carter*, 2 Glyn & J. 233; *Ex parte Ellis*, Glyn & J. 312; *Ex parte Ogle*, Mont. 350.

It is not however sufficient to enable the solvent partner to do so, that he should merely *indemnify* the estate of the bankrupt partner against the joint debts. *Ex parte Moore*, 2 Glyn & J. 166. See vide *Ex parte Ogilvy*, 2 Rose, 177; *Ex parte Taylor*, 2 Rose, 175; *Ex parte Stoveld*, 1 Glyn & J. 303.

In some instances, however, an indemnity may be sufficient, as where the solvent partner cannot obtain a discharge by payment to one of the joint creditors by reason of his lunacy. In such case, upon giving security for the lunatic's debt and paying the residue of the joint debts, he will be allowed to prove against the joint estate. *Ex parte Yonge*, 3 V. & B. 31, 33.

So where a retiring partner has not paid all the demands against the partnership, he has been allowed to prove against the joint estate, either where the remaining partner has been treated as sole debtor by the joint creditor (*Ex parte Grazebrook*, 2 Deac. & Chit. 186), or where a considerable time has elapsed since the dissolution of the partnership. *Ex parte Hall*, 3 Deac. 125.

Where an individual partner becomes bankrupt, being indebted to the firm at the time of his bankruptcy, the solvent partners, upon payment of all the partnership debts, though after the bankruptcy, may prove *pari passu* with the separate creditors, in respect of the debt due to the firm. *Ex parte King*, 17 Ves. 115; *Ex parte Younge*, 2 Rose, 40; 3 V. & B. 31.

Where the separate creditors are paid 20s. in the pound, and there is a surplus, that surplus will not be applied immediately in payment of interest to the separate creditors, but will, in the first instance, be applied in making the joint creditors equal with them as to the principal (per Lord Eldon, C., in *Ex parte Reeve*, 9 Ves. 590; see also *Ex parte Rix*, Mont. 237), and this will be the case, although the balance of the partnership accounts may not have been ascertained. *Ex parte Robinson*, 4 Deac. & Ch. 499.

If, on the bankruptcy of one of several partners, the joint creditors are paid in full, out of the joint estate, but upon the taking of the partnership accounts a balance appears to be due to the solvent partners, the surplus of the joint estate will be paid to the solvent partners, in part payment of the balance due to them, with liberty to prove against the separate estate for the difference, but so that they do not disturb any dividends already made out of it. *Ex parte Terrell*, Buck, 345; *Goss v. Dufresnoy*, Davies, Bankruptcy Law, 371.

If a partner remaining in business covenants to indemnify a retiring partner against all outstand-

ing debts, upon the bankruptcy of the former the latter may, on payment of the partnership debts, for which so far as the creditors were concerned he continued liable, prove for what he pays in respect of such debts under the fiat (*Parker v. Ramsbottom*, 3 B. & Cress. 257; 5 Dowl. & Ry. 138), even although the retiring partner knew, when he left the business, that the firm was insolvent (*Ex parte Carpenter*, Mont. & M'Arth. 1); but if he neglect to prove, the certificate which the bankrupt partner obtains will be a bar to an action on the covenant of indemnity. *Wood v. Dodgson*, 2 Rose, 47.

If a solvent partner pay all the joint debts, the question may be raised, to what extent is he able to prove against the separate estates of his partners? It was held by Sir *John Leach*, V.C., in the case of a solvent partner having paid all the joint debts, that his proof against the separate estates of his partners should be limited to the amount of their respective shares of the joint debts so paid; so that if their estates were insufficient to pay 20s. in the pound, the solvent partner could not be allowed to prove the deficiency of each estate against the estate of the other, and the principle upon which his Honour proceeded was this, that "proof is equivalent to payment, without regard to the amount of the dividend." *Ex parte Watson*, Buck, 449, 456; *Ex parte Smith*, ib. 492.

Lord *Eldon* however dissented from the doctrine of Sir *John Leach*. See *Ex parte Hunter*, Buck,

552; and *Ex parte Moore*, 2 G. & J. 166, 172, where Lord *Eldon* makes the following observations with reference to the doctrine of Sir *John Leach*:—"His Honour," said his Lordship, "has been pleased to say that proof is payment. Now, with great deference, I doubt whether the expression, that proof is payment can be correctly used. If, indeed, the money were paid at the moment the proof was made, it might be a question; but in the case of three partners, and one becoming a bankrupt, and another paying the whole debt, that partner's right of proving a moiety of the whole debt against the other partner would be quite clear, if it were clear that proof against the bankrupt partner could produce nothing; for the same equity which exists among them, if they all remain solvent, must be the equity which prevails among them when they become bankrupt; and the difficulty of ascertaining, at the time the bankruptcy takes place, who is solvent and who is not solvent, can never interfere with the substantial rights of the parties. . . . I am inclined therefore to agree with the case put by Mr. *Montagu*, that if A., B., and C. are partners, and there is a deficiency of £30,000, and that if C. be wholly insolvent, A. paying the whole of such deficiency, is entitled to prove £15,000 against B., B. having the benefit of proof for £5000 against C. I take it to be clear that if A. have two partners, and he pay more than his share, and one of the partners is insolvent, that insolvency is a mischief in which the other partner must par-

take, as well as he who seeks to prove." See also *Ex parte Plowden*, 3 Mont. & A. 402; 2 Deac. 456.

Where distinct firms, consisting of partly the same members, carry on distinct trades, one firm may, upon the other becoming bankrupt, prove against it; at any rate if the estate of the bankrupt firm is not liable together with that of the solvent firm to joint debts. *Ex parte Adams*, 1 Rose, 305; *Ex parte Thompson*, 3 D. & C. 612; 1 Mont. & A. 324. The liability however of the two firms to joint debts were, it seems, disregarded in *Ex parte Hesham*, 1 Rose, 146: see also *Ex parte Cook*, Mont. 228; *Ex parte Sillitoe*, 1 Glyn & J. 374.

Where there are no joint debts, the solvent partner may prove against the bankrupt partner in competition with his creditors. *Ex parte Dodgson*, Mont. & M'Arth. 445.

7. *As to Proof between Estates.*

—As a general rule where the firm has become bankrupt, the separate estate of one partner will not be allowed to claim against the joint estate of the partnership in competition with the joint creditors, nor the joint estate against the separate estate in competition with the separate creditors. *Ex parte Ogle*, Mont. 350; *Ex parte Burrell*; *Ex parte Pine*, Co. B. L. 528; *Ex parte Grill*, ib. 503.

There are however certain exceptions from this rule. Thus if money or effects have been fraudulently abstracted from one estate to benefit the other (*Ex parte Harris*, 2 V. & B. 213; *Ex parte*

Earle, 1 Rose, 64; *Ex parte Yonge*, 3 V. & B. 31; *Ex parte Watkins*, Mont. & M'Arth. 57), and not merely put or left by one partner in the possession of the other (*Ex parte Batson*, 1 Co. B. L. 530; *Ex parte Assignees of Lodge and Fendall*, 1 Ves. Jun. 166; *Ex parte Harris*, 2 V. & B. 210; 1 Rose, 129; and see *Ex parte Turner*, 1 Mont. & A. 54, 357; 4 Deac. & Chit. 169), or where some of the members of a partnership form a distinct firm, carrying on a distinct trade from that of the general partnership, and the articles of one trade are furnished by one firm to the other (*Ex parte Shakeshaft, Stirrup, and Salisbury*, ante, 349; 6 Ves. 747; 1 Cox, 440; 11 Ves. 414; *Ex parte Hargreaves*, 1 Cox, 440; *Ex parte St. Barbe*, 11 Ves. 413; *Ex parte Castell*, 2 Glyn & Jam. 124; *Ex parte Stroud*, ib. 127; *Ex parte Sillitoe*, 1 Glyn & Jam. 374; *Ex parte Cook*, Mont. 228), proof will be admitted by one estate as against the other *pari passu* with the other creditors. See however and consider the remarks of Sir John Leach, V.C., on *Ex parte Brenchley*, 2 Glyn & J. 127; *Ex parte Stroud*, cited *ib.*; and *Ex parte Dawson*, 3 Deac. & Chit. 12.

8. *Contributions between Estates.*

—Where one estate has been subjected to a greater charge than it ought to bear, contribution will be compelled from the other estate in order to make it bear its equal share of the burden. See *Ex parte Willock*, 2 Rose, 392; *Ex parte Wylie*, ib. 393; *Rogers v. Mackenzie*, 4 Ves. 752.

MACE v. CADELL.

November 26th, 1774.

[REPORTED COWP. 232.]

BANKRUPTCY—REPUTED OWNERSHIP.—*A woman permitted a man to have the use of furniture—her property, and she had falsely declared that the man was her husband. Held, that the furniture belonged to the assignees of the man who had become bankrupt, as he was the reputed owner, and had the disposition of it as owner.*

Trover for goods. Upon showing cause why the verdict, given in this case for the plaintiff should not be set aside, and a nonsuit entered the Court took time to consider.

Lord MANSFIELD, C. J., now delivered the unanimous opinion of the Court, as follows :—The plaintiff Mace kept a public-house, had a license, and said she was married to one Penrice. She went to the Excise-office, had his name entered in the books, with a note in the margin “married.” Penrice had the license, and continued in possession of the house and goods from that time till he absconded and went to Pimlico, which was an act of bankruptcy. Mace, the plaintiff, first claimed the goods in question, under a bill of sale from Penrice ; but afterwards as her own original property, and denied that Penrice and she were married. Penrice was examined, and said that it was not till within three weeks before he went away that he knew whether he should marry her or not.

At the trial a doubt occurred to me, whether this case did not come within the statute 21 Jac. I. c. 19, s. 11. For the possession which the bankrupt had of these goods, was emphatically a possession of them *as his own*, and kept by him as such. It was suggested there was a similar case depending in the C. B., where the question was, whether the enacting clause of the eleventh section extends further than the preamble of that section, so as to include *goods*

not originally the bankrupt's. The preamble¹ only says, "And for that it often falls out that many persons, before they become bankrupts, do convey their goods to other men, upon good consideration, yet still do keep the same, and are reputed owners thereof, and dispose of the same as their own." But the words of the enacting part are as follows:—"Be it enacted, that if any person, at such time as he shall become bankrupt, shall by the consent of the true owner, etc., have in his possession, etc., any goods, etc., whereof he shall be reputed owner, the Commissioners shall have power to sell the same in like manner as any other part of the bankrupt's estate." These words clearly extend to other persons' goods, as well as to those which were originally the bankrupt's property. For the sake of conformity, we were desirous to stay till the Court of Common Pleas had given their opinion. But that case, we understand, is made up.

We have considered the general question; and to be sure there is a variety of mootings in the books without any determination. But if the statute meant to comprehend nothing more than is contained in the preamble, it means nothing at all. Because even before the statute, if a man had conveyed his own goods to a third person, and had kept the possession, such possession would have been void, as being fraudulent, according to the doctrine in *Twine's* case (3 Rep. 81). At the same time, the statute does not extend to all possible cases, where one man has another man's goods in his possession. It does not extend to the case of factors or goldsmiths, who have the possession of other men's goods merely as trustees, or under a bare authority, to sell for the use of their principal; but the goods must be such as the party suffers the trader to sell as his own. Therefore upon this ground we are all of opinion that the verdict ought to be set aside.

But in the consideration of this general question another point appeared, upon which we are equally clear; namely, that after a solemn declaration by the plaintiff that she was married to Penrice, and that these were the goods of Penrice in her right, she shall never be allowed to say, that she was not married to him, and that the goods were her sole property. On either ground therefore the

¹ The preamble to the 11th section, which was by mistake included in the 10th, gave rise to some doubt, removed however by *Mace v. Cadell*, whether the 11th section was not confined in its ap-

plication to property which had once been the bankrupt's. The preamble or recital however which gave rise to the doubt was omitted in 6 Geo. IV. c. 16, s. 17, and also in 12 & 13 Vict. c. 106, s. 125.

verdict is wrong. If such a practice were to be allowed, it would be laying a trap for persons to deal with bankrupts.

Per Cur. Let the verdict be set aside, and nonsuit entered.

LINGHAM v. BIGGS AND ANOTHER.

Trin. Term, 37th Geo. III. 1797.

[REPORTED 1 BOS. & PULL. 82.]

REPUTED OWNERSHIP.]—*The furniture of a coffee-house was taken in execution by a creditor, and without ever being removed, was let by him to the keeper of the coffee-house, who became bankrupt while in possession of it. Held that the assignees might seize it under the 21 Jac. I. c. 19, s. 11.*

Trover against the defendants, who were the assignees of Anne Munday, a bankrupt, for all the household furniture, and other articles belonging to a coffee-house.

This cause was tried before *Eyre*, C. J., at Guildhall sittings after last Easter Term.

Anne Munday, the bankrupt, was the widow of a person who had kept a coffee-house, and being indebted to the plaintiff, gave him a warrant of attorney for £800, under which he entered up judgment, and took in execution the goods in question. They were valued by the sheriff at £337. 13s. 6d., and thereupon a bill of sale was made out by the sheriff at that price to Thomas Lingham, the plaintiff's brother, in trust for the plaintiff.

In June, 1791, articles of agreement under seal were entered into between the said T. Lingham, the plaintiff, and Anne Munday, by which the plaintiff let the goods to Anne Munday at the yearly rent of £27 for four years, and she covenanted not to remove them from the coffee-house without the plaintiff's consent. The deed contained a proviso that the plaintiff should enter and take possession on failure in the payment of rent. Anne Munday continued in possession of the goods beyond the four years, and until they were seized under the commission.

At the trial an objection being taken to the plaintiff's recovery on the 21 Jac. I. c. 19, s. 11, the Chief Justice doubted whether this case were within it, and a verdict was given for the defendant, with liberty to enter a verdict for the plaintiff, damages £337. 13s. 6d. if the Court should be of opinion that it was.

Adair, Serjt., having accordingly obtained a rule to show cause why the verdict should not be entered for the plaintiff,

Cockell, Serjt., showed cause. The 21 Jac., being a considerable extension of the bankrupt laws in favour of creditors, ought to receive a liberal construction. It differs from the 13 Eliz., which only provided against fraudulent conveyances; but this statute attaches on all goods left in the hands of a bankrupt, even without fraud, if the bankrupt has thereby obtained a false credit with the world. It was determined in *Stevens v. Sole* (cited 1 Atk. 170; Cooke's Bankrupt Laws, 229) that an ostensible possession of chattels by the bankrupt was sufficient to entitle the assignee under the 21 Jac. Now here Mrs. Munday had as full and ostensible a possession as possible; she had the use of the articles in question, and they were of a perishable nature. Possession of movables imports property; and on that ground, a distinction is taken between a mortgage of realty and a mortgage of chattels; in the latter case the supposition of ownership can only be repelled by notice. In *Ryall v. Rolle* (1 Atk. 165) Lord *Hardwicke* decided on the spirit, not on the words of the act, and thought that the 11th section ought to be governed by the preamble at the end of the 10th section. This case cannot be compared to that of a banker or a factor, because they are known to deal upon commission; nor to that of furniture in lodgings, which is known not to belong to the person in possession; therefore the world is not deceived. The case of *Bryson v. Wylie* (1 Bos. & Pull. 83 n.; Cooke's Bankrupt Laws, 234) is exactly like the one at bar: now that has been recognized at law, and still remains untouched. The more modern cases, where the rule has been narrowed, are distinguishable from that and from the present. In *Walker v. Burnell* (Doug. 317) the bankrupt held the goods for a special purpose, of which the general creditors had notice. In *Collins v. Forbes* (3 T. R. 316) the timber was appropriated to a special purpose, and the bankrupt had not such an ownership as would give him credit with the world. So also in *Jarman v. Woolloton* (3 T. R. 618), *Buller*, J., says, "It is sufficient to say, that the husband had not the order and disposi-

tion of "this property with the consent of the real owner, the trustee."

Adair, Serjt., in support of the rule.—All personal property of which a bankrupt has the possession, is not within the object of the statute. The legislature, not choosing to go that length, added the words, "*order and disposition*," etc., "*sale and alteration*," etc., which words must be rejected if the mere circumstances of possession and reputed ownership are sufficient. Indeed, if this were the case, job coaches, and horses, and furniture in lodgings would be brought within the statute. The act was not intended to interfere with anything but the stock in trade, the possession of which necessarily implies the order and disposition, sale and alteration, etc.; for a trader who is left in possession of his stock does acts every day which make him the reputed owner, and give him a degree of credit beyond what arises from the naked possession. All the cases cited for the defendant, except *Bryson v. Wylie*, are cases of mortgage. In mortgages of realty the absolute property vests in the mortgagee, though the mortgagor continue in possession; but in mortgages of personalty it is otherwise: there the property is only pledged as a security, and the absolute ownership does not pass *de facto* till default in payment of the money. The doctrine of specific liens agrees with this principle, where a person is always held to have parted with the lien when he parts with the possession. *Bryson v. Wylie* was a case of stock in trade and implements of a profession, which come so directly within the act as not to be taken out of it by any private agreement. Lord *Mansfield* there calls it "a new experiment to defeat the bankrupt laws," which he would not have done if he had considered the act as extending to household furniture. The case of *Collins v. Forbes* was within all the mischief contended for: Kent was the ostensible and reputed owner, and all the arguments with respect to false credit were urged: there no visible alteration of the property took place; but here there was an act of notoriety,—there was an execution by matter of record executed in the house, and therefore a visible alteration both by law and fact. *Jarman v. Woolloton* is the strongest case for the plaintiff; for the presumption of property in a husband is of course stronger than in a stranger; and the jury found a verdict for the defendant as to the stock in trade, and for the plaintiff as to the furniture.

Marshall, Serjt., on the same side.

Cur. adv. vult.

2 c 2

This day the judgment of the Court was delivered by—

EYRE, C. J.—This stood over in order to give the Court an opportunity of looking into the case of *Ryall v. Rolle*. We were desirous of reading over that case, lest we should at all break in upon what was there so solemnly decided. In effect there were but two points then agitated, and resolved:—1st. Whether a mortgagee of goods were a true owner within the 21 Jac.; and much labour was employed, and learned distinctions taken between Hypothecation and Pignus, absolute and conditional sale, in order to show that he ought not to be so considered; but by the unanimous opinion of the Chancellor and Judges it was ruled, that a mortgagee was to be considered as the true owner, in opposition to the reputed owner. 2ndly. Whether the trustee of the partner of a mortgagee was to be considered as the true owner, and the mortgagor the reputed owner within the statute. But it is very obvious that neither of these points much affects the present case.

Perhaps the cases which fall within the statute of James may be divided into two classes:—1st. Where goods not originally the property of the bankrupt are left in his order and disposition. In *Ryall v. Rolle*, Lord Hardwicke intimates a pretty strong opinion that the preamble should govern the eleventh clause, and confine it to cases where the bankrupt was the original owner; but in latter times (*Mace v. Cadell*, Cowp. 232, ante, p. 383), the statute has been considered as a remedial act; and it has been thought, that although the bankrupt was not the original owner, yet if he had in his possession the goods of another person, they fell within the statute. This has formed a class of cases as clearly within the 21 Jac. as the first class. Many cases have certainly been taken out of this class by exceptions, as those of factors.

Though *Ryall v. Rolle* goes no further than I have mentioned, yet thus far it may be made use of as an authority here, that it was assumed throughout the whole discussion, both by the bench and the bar, that the words “goods and chattels” in the statute were not to be confined to stock in trade or utensils. The words were there supposed to include choses in action, which might pass by an Act of Parliament, though they could not by bill of sale. The case of an assignment by a bankrupt of a bond which he retains in his possession, and consequently of which he has the disposition, so that he may receive the money, shows how the words “order and disposition” and “reputed owner” are to be understood. They are to be understood thus. Being allowed to have possession of

goods under circumstances which give the reputation of ownership, brings the case within the statute; and it is fair so to consider them, because every man who can be said to be the reputed owner, has incidentally the order and disposition; not indeed between the parties, but as to general appearance. It is impossible for the world at large to inquire what accounts may exist between the parties; general credit with the world is all; if the party be the reputed owner, it imports that he has the order and the disposition, and that he may sell. Admitting that the words "order and disposition, sale and alteration," might refer to such goods only as a party has in his shop, and ready to sell to customers, yet they cannot refer to the actual sale, as they seem to import; for if the goods are once sold, they are out of the power of the assignees. The act supposes them to remain in the possession of the bankrupt, and because they remain there the assignees are allowed to take them. The words therefore must not have that absolute sense which they seem to bear, but must have a meaning consistent with the end proposed to be attained by the statute. If a man be the reputed owner of goods, and appear to have the order and disposition of them, he must be understood to have taken upon himself the sale, order, and disposition within the meaning of this statute. We must suppose that he has done that which the act supposes; and certainly to hold a construction at this day different from that of all the cases on this remedial law, could not be justified by the mere letter of the act.

The question then comes to this,—Can furniture be distinguished from other goods and chattels, to which the statute would extend? Now, I think it cannot, except so far as it may go to show that this bankrupt was not the reputed owner, did not appear to have, and therefore had not the order and disposition; and it was fairly admitted by my brother *Adair*, that it was not worth while to go to another trial on that point; Mrs. Munday had been in such possession, that no jury could have hesitated to pronounce her the reputed owner. That being admitted, I think it necessarily follows from her being the reputed owner, that she will appear to the world to have the order and disposition, sale and alteration, etc. She must clearly derive a credit from these appearances, and, consequently, if the owner allows her to retain the property, however fair that may be between herself and the owner, it must be a fraud upon the creditors.

It has been suggested that this doctrine would go to an incon-

venient length; it was said, by way of instance, that no trader could go into a ready-furnished house, or hire horses on a job, because possession would create a reputation of ownership, and consequently the furniture and horses would be liable to be seized. I admit that possession is always evidence of ownership, and with nothing to oppose it, would create a reputation of it; but it is evidence which may be opposed, and so satisfactorily opposed as to destroy that reputation. Let us pursue this idea. A respectable tradesman, residing in his own house in London, takes a journey for two months to Brighton, or some other seaport, and hires a ready-furnished house; all the world would say that he was the reputed owner of the furniture in the house in London, and not the reputed owner of that in the house at Brighton. So as it is notorious that people do not always drive their own coaches and horses, possession in such a case is only equivocal, and too equivocal to create a reputation of ownership; it would therefore be necessary to go into other evidence to determine of what character the possession was. I have no apprehension of this doctrine going to an inconvenient length.

It has been suggested also, that most of the cases are cases of mortgage, and that they are not in their circumstances like the present. But when once it is determined that a mortgagee is an owner within the statute of James, they will be found to be the same in principle. Two cases have been principally relied on at the bar; that for the defendant was *Bryson v. Wylie*, and that for the plaintiff was *Jarman v. Woolloton*, which last happened to be a case of furniture, and was held not to be within the statute of James. I am unable to perceive in those two cases, or in *Collins v. Forbes*, any difference in the rule of construction with respect to the statute. They are cases where the circumstances to which the statute was applicable lead the Court to different conclusions; perhaps both of them were right; but it is sufficient to say that neither of them has anything in common with the present case: possibly they would not govern other cases much nearer to them in circumstances than this. Notwithstanding *Bryson v. Wylie*, I can suppose that a dyer may be in possession of a plant, without being the reputed owner; I can also suppose cases where a trustee for a married woman, permitting the husband to take possession of the goods and chattels, and to become the reputed owner to all the world, may lose these goods in consequence. We cannot argue from the circumstance of a dyer being in possession of a

plant, and being the reputed owner, that therefore this furniture shall be liable to be taken by the assignees; nor from the furniture being protected in *Jarman v. Woolloton*, that the furniture shall also be protected here. As to the case of *Collins v. Forbes*,¹ we perfectly agree in that decision; because Kent, the carpenter who was to do the work, was not, at the time he became bankrupt, in possession of the goods which were lying in the king's yard, and were in contemplation of law in the possession of the true owner, whoever he was.

It was well observed by Mr. Justice *Buller* in *Walker v. Burnell*, that questions on the 21 Jac. have much more of fact than of law in them. I believe when once it is ascertained whether the bankrupt was the reputed owner or not, there would be very little difficulty in deciding. From that reputed ownership false credit arises; from that false credit arises the mischief; and to that mischief the remedy of the statute applies. This seems a fair and sound construction of the statute; and the present being confessedly a case of reputed ownership, and the other terms of the eleventh section being incidental to reputed ownership, we think the verdict proper.

Rule discharged.²

JOY v. CAMPBELL.

May 1, 2, 4, 5, 12, 1804.

[REPORTED 1 SCHO. & LEF. 328.]

REPUTED OWNERSHIP.]—*T. holds shares in a trading company in trust for W., who by his will appoints T. his residuary legatee. T. continues in possession of the shares and becomes bankrupt. The shares are not within the meaning of the Bankrupt Act, 11 & 12 Geo. III. c. 8, s. 9, inasmuch as T. is himself the true owner and proprietor thereof, subject however to the debts and legacies of W.*

¹ On the decision in that case, see the opinion of Mr. Justice *Lawrence*, as reported in *Gordon v. The East India Company*, 7 T. R. 237.

² See *Manton v. Moore*, 7 T. R. 67.

The object of the Bankrupt Act, 11 & 12 Geo. III. c. 8, s. 9, is to prevent deceit by a trader from the visible possession of property to which he is not entitled; that is, where the possession is not in the true owner, but in one whom the true owner unconsciously permits to have it.

That credit has been given on the faith of the property does not bring the case within the Act.

William Brown, deceased, was, in and before the year 1787, a dormant partner in a mercantile house at Belfast, called the Sugar House Company, in which he possessed one-half of six shares, part of twenty shares of which the capital stock consisted, the other half of which six shares belonged to John Brown, his brother. William Brown was also a dormant partner and had one-third of a share of the capital stock in another mercantile establishment, called the Rope-walk Company, in which John and another brother, Thomas Brown, were concerned in the same manner and to the same extent, each having one-third of a share.

In 1787 John Brown, being about to commence business as a banker, assigned his interest in the said two mercantile concerns to his brother William in trust for himself, and William executed a declaration of trust accordingly; and shortly after, William, intending to enter into another banking-house, prevailed on Thomas (who was apprised of the former trust) to become a trustee both for him and for John, for their respective shares in the said houses. The other partners having agreed to accept Thomas as a partner, an assignment was executed to him for merely nominal consideration, the object being to evade the provisions of the Bankers Act,¹ and soon after the execution of the assignment Thomas cancelled the deed by cutting off the name and seal of William, and delivered back the deed so cancelled to William, in whose possession it remained till his death. Thomas regularly received the dividends accruing from the said companies, and duly paid over to William his shares during his life, and gave credit to John, in his account with him, for the amount of his shares. During the period of these transactions Thomas carried on a distinct trade in partnership with John Oakman, under the firm of Brown and Oakman.

William Brown died in 1794 without issue, seized and possessed of considerable real and personal estates; having shortly before

¹ 29 Geo. II. c. 16.

his death made and published his last will and testament, whereby amongst other pecuniary legacies he bequeathed to the plaintiff, William Brown Joy, son of his niece Mary Anne Joy, £1000, to be paid when he should come of age, with interest, or sooner, at the option of his executors; and in case W. B. Joy should die under the age of twenty-one years without having received his legacy, the testator ordered and directed the same to go to and be paid in equal shares amongst the other children of the said Mary Anne Joy, amongst whom he also bequeathed the further sum of £2000. The testator then devised the farm and premises at the 'Throne,' which was held under a lease for lives, to his nephew William Brown, son of his brother Thomas, to hold to him, his heirs, executors, administrators, and assigns, from the time he should attain the age of twenty-one years; but in case his said nephew should die under the age of twenty-one years, he devised the said farm and premises to the next eldest son his said brother Thomas should happen to have, when such next eldest son should attain the age of twenty-one years, and to his heirs, executors, etc.; and in case no son of his said brother Thomas should attain the age of twenty-one years, then he devised the said premises amongst the daughters of his said brother, share and share alike: with this special limitation, that none of the said devises should take effect until the decease of Thomas; for that it was the testator's will, and he did thereby direct that his said brother should have and enjoy the free use and benefit, profits and advantages of the said farm and premises from the testator's decease, for the term of his natural life without impeachment of waste. The testator then bequeathed £3000, in equal shares, among the children of Thomas; and gave, devised, and bequeathed all the rest, residue, and remainder of his lands, tenements, freehold estates, effects, money, and securities for money, goods, chattels, and worldly property of every description and denomination whatsoever and wheresoever, unto his brother Thomas Brown, his heirs, executors, administrators, and assigns; and nominated his good friends John Campbell (to whom also he gave a legacy of £100) and James Joy, with his brother Thomas Brown, to be executors and trustees of his will; directing further, that such of the legacies therein mentioned as should remain unpaid at the end of twelve months from his decease, should be then well and sufficiently secured upon his freehold or personal estates and assets, and should bear legal interest from thence until paid.

All the executors proved the will, but as James Joy did not live at Belfast, where the property principally lay, it was managed by the others; Thomas Brown continuing until his bankruptcy in October, 1798, to receive the dividends of the Sugar-house and Rope-walk Companies, *as trustee*, collecting debts due to the deceased, and paying some of his debts and legacies; and Campbell (who had been the partner of William in the Bank) retaining in his hands a sum of £5285. 1s. 5d. belonging to his testator, which was lying in the bank at the time of his death, and paying himself his legacy of £100. With respect to this sum of £5285. 1s. 5d. the following transactions took place. Campbell had in the lifetime of William Brown lent a sum of £4200 to Brown and Oakman, on the joint note of William and John Brown and Brown and Oakham, for £1500, and of William Brown and Brown and Oakman for £2700. Of this, part was paid in William Brown's lifetime, and there remained due at his death the sum of £3232, which Campbell received from the bank, and lodged the notes in the bank to the credit of William Brown's account. Soon after, the bank settled accounts with Thomas Brown as executor of William Brown, on which occasion, after deducting the said sum of £3232, and also a sum of £1540 which had been previously paid to Thomas Brown, a balance of £513. 1s. 5d. appeared due to the estate of William Brown, which was then paid him, and a receipt for the whole sum of £5285. 1s. 5d. was given to the bank by Campbell and Thomas Brown as executors. At the same time, the notes not only of William Brown but of John Brown and of Brown and Oakman, were given up to Thomas Brown, and no steps were ever taken to compel payment against either John Brown or Brown and Oakman.

After the bankruptcy of Brown and Oakman (which did not take place until October, 1798), the assignees insisted on their right to have not only Thomas's original share in the Rope-walk Company, but also that which he held in trust for William, which trust he had admitted on his examination before the Commissioners; and this claim, having been disputed by the executors of William, was submitted to arbitrators, who decided in favour of the assignees; in consequence of which the value of that share was paid over to them by the company.

Thomas Brown died on the 2nd of July, 1801, before his son William Brown, or any of his children, had attained their age of twenty-one years.

The present bill was filed on the 14th of January, 1803, by the

children of Mary Anne Joy against John Campbell, James Joy, John Brown, and the assignees and children of Thomas Brown, charging that, owing to the misapplication of the assets by Thomas Brown and Campbell, there was not a sufficiency left to pay them the legacies bequeathed to them by the will of William Brown, and praying that his executors should account, and that Campbell might answer in particular, for such part of the testator's estate as had been misapplied in the payment of the notes in which William was security for Thomas Brown and Brown and Oakman; or that John Brown should contribute to the payment thereof; and that the award made in favour of the assignees of Thomas Brown might be set aside; and that the whole real and personal estate of William might be decreed subject to his debts and legacies, and might be sold for the payment thereof, or that the plaintiffs might be permitted to claim as creditors on Thomas Brown's estate for the amount, and also for all sums received by him before his bankruptcy for William Brown on account of the two companies.

The *Attorney-General* and Mr. *Saurin*, Mr. *Mayne* and Mr. *Joy*, for the plaintiffs. Mr. *Dunn* and Mr. *Bushe*, for the defendants, Campbell and Joy. Mr. *Ball* and Mr. *Bell*, for the assignees of Thomas Brown.

For the assignees it was urged that they had no knowledge of the alleged trust as to the shares in the two companies; and insisted that when William Brown was about to become a banker, he assigned those interests *bond fide* to Thomas, who accordingly had ever after until his bankruptcy exercised the ostensible ownership over them; that no declaration of any trust appeared on the deed of assignment, which had come to the hands of the assignees; but that even though the existence of the trust were proved, and though Thomas might have acknowledged it, such acknowledgment ought not to defeat the claims of his just creditors, who had given him credit on account of such supposed property. They insisted on the clause in the Bankrupt Act (11 & 12 Geo. III. c. 8, s. 9), by which it is enacted, "That if any person or persons shall become bankrupt, and at such time shall by the consent and permission of the true owner and proprietor have in their possession, order, and disposition, any goods or chattels whereof they shall be reputed owners, and take upon them the sale, alteration, or disposition as owners (such goods excepted as shall be in the custody of such bankrupt by consignment or factorage), in every such

case the Commissioners or the major part of them shall have power to sell and dispose of the same to and for the benefit of the creditors who shall seek relief by the said commission, as fully as any other part of the estate of the said bankrupt," and cited the cases of *Lingham v. Biggs* (1 Bos. & P. 82, ante, p. 385), *Bryson v. Wyllie* (1 Bos. & P. 83 n.), and *Gordon v. East India Company* (7 T. R. 228), to show that being allowed to have possession of goods under circumstances which give the reputation of ownership brings the case within this clause of the statute. It was also argued on their behalf, that the trust was created in fraud of the law, for the purpose of defeating the policy of the Bankers Act, and therefore was of such a nature as a Court of Equity should not recognize. If William Brown in his lifetime had quit the business of a banker, and then had filed his bill to compel Thomas to declare the trust, he must have stated in that bill the purpose for which it was created, and in that case could he have been entitled to an execution of the trust? And if not, can the plaintiffs, claiming as volunteers under him, be in a better situation? It was urged that if either of the companies had sustained loss in trade, that loss must have been borne by the personal estate of Thomas, and not that of William, inasmuch as the deeds of co-partnership were executed by Thomas only, and there was no indemnity or any other security given by William. It was submitted therefore that the award was right, and that the assignees were entitled to retain these shares for the benefit of the creditors.

On behalf of John Campbell, it was said that he, being an aged and very infirm man, had undertaken the executorship out of respect to the memory of the testator, and without any intention of acting; which was the less necessary on his part, as James Joy and Thomas Brown were both active men, conversant in business, and particularly interested in the due management of the fund; the first, on account of the legacies given to his children (the plaintiffs); and the other, as being entitled to the residuum. With regard to the transaction respecting the property of William Brown which remained in the bank at the time of his death (which was the only particular in which Campbell appeared at all to have intermeddled), so far as the amount of the notes in which William Brown had joined, he had made himself debtor to Campbell, who had lent the money on the credit of the balance in the bank, and had a right to distrain for that debt: he was not, as creditor of William Brown, bound to resort to the other makers of the notes; the acting exc-

cutor had the notes in his hands from the time the accounts were settled with the bank. At that time, John Brown and Brown and Oakman were in full credit, and Campbell had no reason to suppose that the assets of William Brown were in danger from non-payment of those notes; he had, on the contrary, sufficient reason to rely on Thomas Brown's procuring payment of them, he being a residuary legatee, the person most likely to be interested in them. Then the handing over to Thomas Brown the notes (which had in fact become the property of William Brown instead of the amount of them retained by Campbell) was payment to Thomas Brown, and the circumstance of Campbell's joining in the receipt to the bank ought not to charge him, as it was a mere formal act, and necessary for the satisfaction of his partner in the bank. The signing of the receipt is not of itself conclusive evidence in Equity of receiving property (*Scurfield v. Howes*, 3 Bro. C. C. 95); but here there is evidence that the property was not received by Campbell, though he signed the receipt. *Westley v. Clarke*, 1 P. Wms. 83 n.

Lord Chancellor REDESDALE.—I shall consider further the point with respect to Campbell and the 'Throne' property. The only other question is with respect to the shares in the partnership concerns.

There is no ground for holding that the transaction is of such a nature as disabled Thomas Brown from saying that the shares in the Sugar-house and Rope-walk Companies, assigned by William to him, were not the assets of William. I will not enter into a discussion of the question, whether William might not have compelled Thomas to account with him as trustee if he had brought a bill in his lifetime; but as between the creditors and legatees of William and Thomas there is no doubt in point of conscience, Thomas was bound to consider this a trust for them, and accordingly he does after the death of William acknowledge himself to be a trustee; and I should have conceived that if the question had arisen on an action brought against Thomas by creditors of William, whether there were or were not assets in his hands, the declaration which he made would preclude him from saying that they were not; therefore the case is confined to this question, whether under the operation of the bankrupt laws this property is so bound that notwithstanding the bankrupt himself is so subject in equity and conscience to the creditors, that he might have been charged at law, yet that the property shall not be liable in the hands of the assignees by reason of the clause in the statute. Now that clause refers to

chattels in the possession of the bankrupt; "in his order and disposition with consent of the true owner;" that means, *where the possession, order, and disposition, is in a person who is not the owner—to whom they do not properly belong, and who ought not to have them, but whom the owner permits, unconscientiously as the Act supposes, to have such order and disposition.*

The object was to prevent deceit by a trader from the visible possession of a property to which he was not entitled; but in the construction of the Act the nature of the possession has always been considered, and the words have been construed to mean possession of the goods of another with the *consent* of the *true owner*. Now who was the true owner of this property after the death of William? The true owner was Thomas, subject to the payment of the debts and legacies of William. Thomas was the acting executor and residuary legatee, and the possession was therefore according to his right, but even as against him chargeable in favour of creditors and legatees, the creditors having a right to charge at law or in equity; the legatees in equity only. In all those cases in which that clause in the act has been permitted to have the effect of divesting the right in the person who has a right to the property, the nature of the possession has always been considered, and whether it was according to right.¹ In cases of specific chattels, which are settled on marriage upon the husband for life, and then on the children, the possession has been with the party, the bankrupt, with the consent of the party creating the trust, and so far, with the consent of the true owner; but the possession was according to the title qualified by the rights of others; and wherever that has been the case, I take it the law has never been construed to extend to destroy that right of property; but it has been confined to those cases where the sole and absolute owner of the property has permitted it to remain in possession of the trader, in whose possession it ought not to be.

In *Bryson v. Wylie* (1 Bos. & P. 83, n.), and cases of that description, the construction has been this: the property was in the bankrupt; he meant to make a transfer of it, as a security, and to do so by a deed; but a deed was not competent to complete the transfer, that is, to give an absolute title, without delivery; and, consequently, the title was imperfect; and being imperfect and he

¹ *Edwards v. Harben*, 2 T. R. 587; *Collins v. Forbes*, 3 T. R. 316; *Jarman v. Woolloston*, 3 T. R. 618; *Manton v. Moore*, 7 T. R. 67; *Gordon v. East India Co.*, 7 T. R. 228.

remaining in possession, it has been held that the property shall be considered as remaining in possession of the trader, with the consent of the true owner, that is, the mortgagee. If there be a mortgage of household estates, where the possession, according to the nature of the transaction, remains with the mortgagor, the law does not apply; but if there be a sale, the possession remaining with the trader, the law would apply. Now, I think, if we look at all these cases, we shall perceive that the law (which in certain cases is a severe law) must always be construed by this criterion, *Was the possession that of a person not the owner with the consent of the true owner?* If it was the case, it is within the meaning of the statute. Now here, from the death of William, the property was in that condition that it was perfectly competent to Thomas to acknowledge that he was trustee; he did so acknowledge; and his possession was according to the right of property, qualified by the right of others.

That credit is given on the property is a circumstance which might belong to a variety of other cases not within the statute. In *Marshal's* case, for instance, the creditor who had the plate could not know that it was settled on the marriage; but possession was according to the ownership; he was the rightful owner, and therefore the rule did not extend to that case. Here, for four years after the death of William, Thomas treated this as the estate of William: he held it indeed in his own possession, but that possession was according to the ownership, and therefore it shall not give a right to the assignees which otherwise would not be in them. I therefore think, with respect to this property, that the right is with the creditors and legatees.

And here I would observe that the effect of this law is not a forfeiture of the property. In *Bryson v. Wylie*, Bryson was a creditor of the bankrupt for so much, and his taking that species of security did not avoid his demand for the debt. If a man were to purchase goods and pay for them, and permitted them to remain in the hands of the seller, who became bankrupt, he would be a creditor to the amount of the money he paid for the purchase.

As to that part of the case therefore, there is no difficulty in saying that this money must be accounted for: I do not touch on the case of John Brown, nor on what would have been done if William had filed a bill in his lifetime.

I remember a case where a person who was executor to a smuggler, on being called on to account for the estate of the testator, en-

deavoured to avoid a considerable part of the account, by saying that they were smuggling transactions, on which the Courts would not allow any action to be maintained. The answer was, all that died with the smuggler; he could not have sued himself; but his executor shall not set up that as a defence against his creditors and legatees.

May 12, 1804.

Lord Chancellor REDESDALE.—I have stated my opinion with respect to the greater part of this case. . . . I have since that time thought more and more on the subject, and have looked into the Act of Parliament; and it is impossible to say, within the words of the Act, that under the circumstances of the case, these interests were chattels in possession of the bankrupt with the consent of the true owner: with respect to them he was the true owner, subject to the interest which the persons who claimed under W. Brown had. Therefore I must consider this question, as I did before, clearly with the plaintiffs.

Mace v. Cadell, Lingham v. Biggs, and Joy v. Campbell, are printed together, because they are always referred to as the leading cases upon the doctrine of reputed ownership. *Whitfield v. Brand*, 16 M. & W. 286, 288.

This doctrine derives its origin from the 10th and 11th sections of 21 Jac. I. c. 19, with some alterations, incorporated in 6 Geo. IV. c. 16, s. 72, which has since been repealed, and, in effect, re-enacted by the 125th section of 12th and 13th Vict. c. 106. That section is as follows:—"That if any bankrupt, at the time he becomes bankrupt, shall, by the consent and permission of the true owner thereof, have in his possession, order, or disposition, any goods or chattels whereof he was reputed owner, or

whereof he had taken upon him the sale, alteration, or disposition as owner, the Court shall have power to order the same to be sold and disposed of for the benefit of the creditors under the bankruptcy. *Provided* that nothing herein contained shall invalidate or affect any transfer or assignment of any ship or vessel, or any share thereof, made as a security for any debt or debts, either by way of mortgage or assignment, duly registered according to the provisions of an act of Parliament, holden in the eighth and ninth years of the reign of her Majesty, intituled, 'An Act for the Registering of British Vessels,' or any of the acts therein mentioned."

On comparing this section with the 11th section of 21 Jac. I. c. 19, it will be found to agree with

it substantially, except that following 6 Geo. IV. c. 16, s. 72, for the words "possession, order, *and* disposition," it substitutes "possession, order, or disposition," and for the words "whereof they shall be reputed owners, and take upon them the sale," etc., it substitutes the words "whereof he was reputed owner, *or* whereof he had taken upon him the sale," etc.

The clause of the new act which has been before set out, differs from the corresponding clauses in 21 Jac. I. c. 19, and 6 Geo. IV. c. 16, s. 72, inasmuch as instead of the provision in the two last-mentioned acts as to goods and chattels in the reputed ownership of the bankrupt, that "the *Commissioners* shall have power to sell and dispose of the same for the benefit of the creditors under the commission;" the new act contains a provision that "the *Court* shall have power to order the same to be sold and disposed of for the benefit of the creditors under the bankruptcy."

The proviso as to shipping in the new act following that in 6 Geo. IV. c. 16, s. 72, is not to be found in the statute of James I., and now by 17 & 18 Vict. c. 104, s. 72, "No *registered mortgage* of any ship, or of any share therein, shall be affected by any act of bankruptcy committed by the mortgagor after the date of the record of such mortgage, notwithstanding such mortgage at the time of his becoming bankrupt may have in his possession and disposition and be reputed owner of such ship or share thereof; and such mortgage

shall be preferred to any right, claim, or interest in such ship, or any share thereof which may belong to the assignees of such bankrupt." See also *Boyson v. Gibson*, 4 C. B. 121; *Campbell v. Thompson*, 2 Hare, 140, 143.

"A luminous exposition by Lord *Redesdale* of the corresponding Irish Act (11 & 12 Geo. III. c. 8, s. 9)," observes *Parke, B.*, "will be found in *Joy v. Campbell* (1 S. & L. 336); Lord *Redesdale* there says, 'That clause refers to chattels in the possession of the bankrupt, "in his order and disposition, with consent of the true owner." That means where "the possession, order, and disposition" is in a person who is not the owner, to whom they do not properly belong, and who ought not to have them, but whom the owner permits, unconscientiously as the act supposes, to have such order and disposition. *The object was to prevent deceit by a trader from his visible possession of property to which he was not entitled;* but in the construction of the act, the nature of the possession has always been considered, and the words have been construed to mean possession of the goods of another with the consent of the true owner.'" *Whitfield v. Brand*, 16 M. & W. 286; and see *Belcher v. Bellamy*, 2 Exch. 309.

Somewhat similar provisions have been made in favour of the assignees of persons taking the benefit of either of the acts for the relief of insolvent debtors (1 & 2 Vict. c. 110, ss. 37, 57; and see 5 & 6 Vict. c. 116, s. 1; 7 & 8 Vict. c. 96,

for he will be presumed to have continued in possession as owner, if it be not shown by the purchaser or mortgagee, as the case may be, not only that there was a change of ownership, but that that change of ownership had become notorious to the world (1 B. & C. 313; *Muller v. Moss*, 1 Mau. & Selw. 335), unless perhaps in those cases where, from the nature of the business carried on by the tradesman with whom goods are left, it is not to be inferred that all the goods in his possession belong to him. *Hamilton v. Bell*, 10 Exch. 545.

The fact of the initials of the purchaser having been written upon goods will not be sufficient evidence of the notoriety of the change of property. Thus in *Knowles v. Horsfall*, 5 B. & Ald. 134, Dixon, a spirit-merchant, sold to the plaintiff, a wine-merchant, several casks of brandy, some of which at the time of the sale were in Dixon's own vaults, and others in the vaults of a regular warehouse-keeper at Liverpool. At the time of the sale, it was agreed that the brandies should remain in the several warehouses in which they were then deposited, rent free, until it suited the convenience of the plaintiff to remove them. Immediately after the sale, the plaintiff caused the letter K to be marked in chalk on each of the casks by his warehouseman. It was notorious in the wine trade, that these sales had been made to the plaintiff, but no notice of the sale had been given to the warehouse-keeper with whom

some of the casks had been deposited. Dixon having become bankrupt while the brandies remained where they were originally deposited, it was held by the Court of King's Bench that the whole of them passed to his assignees. "It appears," said *Abbott, C. J.*, "that some of the casks remained in the vaults of Dixon, the original seller, and that the others were in the vaults of a warehouse-keeper. As to the latter parcel, if the plaintiff had given notice of the sale to the warehouse-keeper, the latter would not then have been justified in delivering them to the order of Dixon, who had placed them there. It is clear, therefore, that that parcel of goods remained after the sale subject to the order and disposition of the bankrupt. With respect to the brandies which remained in his own vaults, the case is much stronger, because as to them Dixon united in himself the character of warehouse-keeper and that of merchant or dealer in the commodity. Any person who went for the purpose of purchasing these brandies could not know that Dixon did not continue the owner. He had the corporeal power over them. The letter K, marked on the casks, might speak a language to a certain class of persons intelligible; but to others, who might be induced to become the creditors of Dixon, in the belief that the brandies belonged to him, it would be wholly unintelligible. If any person of the latter description had purchased them of the bankrupt, I have no doubt that he

would have had a good title to them as against the plaintiff; for the real owner ought not to have left the goods, after the purchase, in the hands of Dixon, and suffered him to treat them as his own." See also *Lingard v. Messiter*, 1 B. & C. 308; *Leake v. Loveday*, 4 Man. & Gr. 972; 2 Dowl. P. C. n. s. 624.

In the case, however, of *Ex parte Marrable*, 1 G. & J. 402, where wine sold by the bankrupt remained in his cellars, but was set apart in a particular bin, and marked with the purchaser's seal, and entered in the bankrupt's books as belonging to the purchaser, it was held by Sir J. Leach, V. C., to belong to the purchaser, and not to be in the order and disposition of the bankrupt. And in the recent case of *Hamilton v. Bell*, 10 Exch. 552, Alderson, B., said that *Knowles v. Horsfall* "merely sets forth a particular state of facts from which the Court were to draw their own conclusion, and for that reason I regret that I reported it." See also *Ex parte Dover*, 2 Mont. Deac. & De G. 259.

The mere handing over to a mortgagee of the key of a house of the mortgagor's, in which furniture, the subject-matter of the mortgage, is kept, will not, it seems, be sufficient to take the furniture out of the order and disposition of the mortgagor. *Ex parte Staner*, 33 L. T. 244.

The fact that goods have been seized under an execution, and the sheriff's officer having been in possession, is not sufficient to show

that the change of property has become notorious to the world; it is at most only evidence of the notoriety of the goods having been taken in execution; for when the owner continues in possession, as, for instance, under a demise from the execution creditor, it may well be supposed that the execution has been withdrawn in consequence of the debt having been paid; and the very circumstance of the bankrupt having afterwards continued in possession of the goods, might well induce others to suppose that such was the fact, and that he still continued owner. *Lingard v. Messiter*, 1 B. & C. 308, 814.

It seems, however, that although the bankrupt was the original owner of the goods, the mere possession of them will not be sufficient of itself to show that he is the reputed owner, if they were left with him under circumstances not calculated to lead the world to believe that he was the true owner. See *Hamilton v. Bell*, 10 Exch. 545. There the plaintiff purchased some clocks of a London tradesman, who kept a shop in which were exposed for sale clocks and watches. A portion of the tradesman's business was to clean and repair clocks, and such as were sent to him for that purpose stood amongst those in the shop which were for sale. The plaintiff left the clocks which he had purchased with the tradesman, with directions that they were to be sent to him when they had been cleaned and put in order. The tradesman

some time afterwards became bankrupt, the plaintiff's clocks still remaining in his shop. In an action by the plaintiff against the assignees for taking these clocks, it was held, under the circumstances, there was no evidence either that the bankrupt was the reputed owner of the goods, or that they were in his possession, order, or disposition, within the meaning of the 125th section of the Bankrupt Law Consolidation Act; and consequently that the goods did not pass to the assignees. "The true exposition of the 125th section," said *Alderson, B.*, "is this. The goods to be sold for the benefit of the creditors are those of which the bankrupt has become the reputed owner by the consent and permission of the true owner, who has made him so by placing the goods in the order and disposition of the bankrupt, under such circumstances as he must reasonably know will lead the world to treat the bankrupt as the true owner. Thus, if property be sent to a shop where goods are sold as the property of the shopkeeper, that property is placed in such a situation as, in the eyes of the world, would fairly lead to the inference that it belongs to the possessor; and such a case falls within the meaning and spirit of this clause of the statute; and such goods would go to the assignees, to be disposed of for the benefit of the creditors. But if, as here, the goods are left in a shop where it is notorious that goods are placed for other purposes than sale, namely, for the conveni-

ence of the owners, the conclusion cannot be reasonably drawn that the goods are the property of the shopkeeper." See also *Carruthers v. Payne*, 5 Bing. 270; 2 M. & P. 429; *Bartram v. Payne*, 8 Car. & P. 175.

The possession of a servant will be considered as that of his master (*Jackson v. Irvin*, 2 Campb. 48; *Toussaint v. Hartop*, Holt, 335), and the possession of a carrier as that of the person who employs him (*Hervey v. Liddiard*, 1 Stark. 123); but the possession of the pawnee will not be considered as that of the pawnor. Thus in *Greening v. Clark*, 4 B. & C. 316, where the plaintiff bought from one Phillipson goods in the East India Company's warehouses, and left the warrants in Phillipson's hands, who pledged them, and afterwards became bankrupt whilst the warrants were in the possession of the pawnee, it was held by the Court of King's Bench that the goods did not pass to the assignees. It was observed by the Court, that the effect of the statute was to render the property of one person, under certain circumstances, available as a fund for the payment of the debts of another; that such a statute, although in some cases very beneficial, should not be applied to any that did not come within the words of it; . . . that the goods in question certainly were not in the possession of Phillipson at the time of his bankruptcy, nor could he have obtained the possession without repaying the pawnee the money that he had

advanced. The case then did not fall within the words of the statute; and as without the statute there was no defence to the action, the verdict was properly found for the plaintiff, and ought not to be disturbed.

A question may arise as to what is the effect of a joint possession of the servants of the bankrupt, and of the owner of the goods, with respect to reputed ownership. It was discussed in *Ex parte Marjoribanks*, 1 De Gex, 466, where the Chief Judge thought that the true owners, the petitioners, were entitled to try the question in an action, the terms of which were settled, but the matter was afterwards compromised.

A tortuous seizure by a sheriff will not take goods out of the possession of the reputed owner. Thus in *Barrow v. Bell*, 5 Ell. & B. 540, Eyre, a trader, had in his house goods, not his own property, in his order and disposition with the consent of the true owner. The sheriff entered the house under a *fi. fa.* against the trader, and made a levy. A man was left in possession in the house, but no change was made in the apparent possession of the goods by the trader, until after the filing of a petition for adjudication of bankruptcy against him, under which he was declared a bankrupt. It was held by the Court of Queen's Bench that the act of the sheriff did not withdraw the goods from the order and disposition of the bankrupt, and consequently that the Court of Bankruptcy might order them

to be sold by the assignees, as against the true owner. "It is clear," said Lord Campbell, C. J., "that the sheriff in seizing those goods was a wrong-doer; for the writ authorized him to seize Eyre's goods, not those of the plaintiff in Eyre's possession. The case is therefore, I think, as if the sheriff had no writ at all, or the person seizing had been any other wrong-doer. It seems to me that what took place between Eyre and the sheriff is, as between the true owner and the assignees, *res inter alios*, having no operation, and leaving their rights as if the sheriff had never entered." See also *Jackson v. Irvin*, 2 Campb. 48.

The result, however, will be different where the goods seized by the sheriff are the property of a mortgagor, in whose possession they are allowed to remain by the mortgagee. Thus in *Ex parte Foss*, 2 De G. & Jo. 280, Baldwin was the owner of the type and plant used in the publication of certain newspapers. He mortgaged the type and plant to Foss. Afterwards the sheriff entered under an execution issued by a creditor of Baldwin, and, though possession was demanded by Foss, remained in possession till Baldwin had become bankrupt. It was held by the Lords Justices of the Court of Appeal in Chancery, reversing the decision of Mr. Commissioner Evans, that the type and plant were not within the order and disposition of the bankrupt at the time of his bankruptcy, with the consent of the true owner.

Lord Justice *Turner*, after distinguishing the case from *Barrow v. Bell*, 5 Ell. & Bl. 540, observes, "Now how does this case stand? The sheriff takes possession of the plant. One of the mortgagees gives him notice to withdraw. There is no pretence for saying that the possession afterwards was in any sense the possession of the bankrupt, or that the bankrupt continued in possession after the execution by the sheriff, in the same mode as he had been in possession prior to the execution levied. This state of circumstances, I think, brings the case distinctly within the doctrine of *Fletcher v. Manning* (12 Mees. & W. 571), which is in conformity with a long train of previous decisions to be found in *Jones v. Dwyer* (15 East, 21), and *Arbouin v. Williams* (Ry. & Mood. 72), and in *Ex parte Smith* (Buck, 149), and *Robinson v. McDonnell* (2 B. & Ald. 134). The case seems to me, therefore, to be clearly in favour of the mortgagees as to the plant."

It has been suggested that the doctrine of reputed ownership applies only where the possession of the bankrupt is purely permissive, so that his ownership is merely apparent; and that where he is in possession under an interest by virtue of which he is true, though only limited, owner, the doctrine in question has no application, and the assignees take no more than the limited interest vested in the bankrupt. Upon the principle just stated, it is observed, that it is considered that where a person

mortgages personal chattels by a deed so framed that he takes under it an interest in the chattels mortgaged for a term determinable upon his own default in payment, this limited interest saves him from being merely reputed owner, and by preventing his bankruptcy from passing anything more than the transient and defeasible interest vested in him; in effect, gives complete protection to the mortgagee."

4 David. Convey. 614 n., 4th ed. by Davids. & Waley. This doctrine is supposed to rest upon the cases of *Fenn v. Bittleston*, 7 Exch. 152; *Brierly v. Kendall*, 21 L. J. Q. B. 161; and a dictum of Lord *Cranworth*, in *Ex parte Barclay*, 5 De G. Mac. & G. 403; and in practice, until this doctrine has been absolutely pronounced incapable of support, it may be well, in drawing bills of sale by way of mortgage of chattels, to act upon the suggestion in the work already referred, viz. to "fix the day of payment at a term beyond what can reasonably be anticipated as the duration of the mortgage, or in the alternative within a specified number of days after demand by the mortgagee, and inserting a proviso for quiet enjoyment by the mortgagor until the end of such determinable term, or until default made in payment of interest." 4 Davids. Conv. 620 n., 2nd ed. by Davids. & Waley.

Although it may be advisable to adopt, as a measure of precaution, the form of mortgage thus suggested, it is nevertheless conceived that even in such cases the

mortgagor in possession would be deemed the reputed owner. *Freshney v. Carrick*, 1 Hurlst. & Norm. 653; *Ex parte Staner*, 33 L. T. 244; see also *Bryson v. Wylie*, 1 Bos. & P. 83 n.; *Lingard v. Messiter*, 1 B. & C. 308; *Coombs v. Beaumont*, 5 B. & Ad. 72.

With regard to the second class of cases, viz. those in which the bankrupt was not originally the owner of the goods and chattels in his possession, it has been well illustrated in the principal case of *Lingham v. Biggs*, by the case put of the furniture let with a ready-furnished house, and of horses let on job. In these and such like cases, possession is evidence of ownership, and if there be no evidence to oppose thereto, would create a reputation of ownership. This evidence, however, might be opposed, and so satisfactorily opposed, as to destroy that reputation. "If," says *Eyre, C. J.*, "a respectable tradesman, residing in his own house in London, takes a journey for two months to Brighton, or some other sea-port, and hires a ready-furnished house: all the world would say that he was the reputed owner of the furniture in the house in London, and not the reputed owner of that in the house at Brighton. So, as it is notorious that people do not always drive their own coaches and horses, possession in such a case is only equivocal, and too equivocal to create a reputation of ownership; it would therefore be necessary to go into other evidence to determine of what character the possession was."

Ante, p. 390. See *Gurr v. Rutton*, Holt's N. P. Rep. 326.

There is moreover a class of tradesmen, who although neither brokers nor agents, nevertheless are in possession of property the greatest portion of which belongs to other people; for instance, silversmiths and jewellers, who have in their possession for years, family plate and jewels of great value; and such articles, whether exhibited or not, in the case of the bankruptcy of the tradesman, ought not to pass to his assignees. Per *Pollock, C. B.*, in *Hamilton v. Bell*, 10 Exch. 550.

Upon the same principle where utensils necessary for carrying on a trade are hired or leased to a trader, they will *prima facie* be considered as being in his reputed ownership. Thus the vats and utensils of a brewery (*Horn v. Baker*, 9 East, 215), and the implements of a mill and iron forge (*Olark v. Crownshaw*, 3 B. & Ad. 804), have been considered as being in the reputed ownership of the hirer or lessee.

The usage however of certain trades to let out utensils of trade or machinery, and the notoriety of such a usage in the trade, may rebut the presumption of ownership which would otherwise arise from the possession. Thus, for instance, where it is the usage in a country for the owners of collieries to demise the machinery and other things used in the colliery (*Storer v. Hunter*, 3 B. & C. 376; and see *Thackthwaite v. Cock*, 3 Taunt.

490); for the owners of furniture to let it out to hotel-keepers (*Mullett v. Green*, 8 Carr. & P. 382); for the owners of barges to hire them out to coal-merchants (*Watson v. Peache*, 1 Bing. N.C. 327); in these and such like cases, the usage may rebut the presumption of ownership.

So it is stated that in the counties of Nottingham and Leicester, it was extremely common for the working hosiers to have on hire the possession of stocking-frames—valuable machines, which they were unable to purchase, and which therefore, coming within the reason of job carriages, job horses, and the like, would not be considered as being in the reputed ownership of the hirer. See *Thackthwaite v. Cock*, 3 Taunt. 490.

It is sufficient if the custom be shown to be so general as that all should know it who had dealings or were likely to have dealings with the bankrupt. See *Watson v. Peache*, 1 Bing. N. C. 327. There a coal-merchant at the time of his bankruptcy had in his possession barges which bore his own name and number, and were registered in his name under the Waterman's Act. These barges he had hired of the defendant. It was proved to be the custom for coal-merchants to hire barges, and to paint on them the name of the hirer. Upon a question whether the barges passed to the coal-merchant's assignees under his bankruptcy, it was held by the Court of Common Pleas that *Tindal*, C. J., before whom the cause had been tried, had properly

left it to the jury to determine whether the custom to hire barges on which the hirer had painted his own name and number was generally notorious in the coal-trade, and that it was not necessary to direct them to inquire whether the custom was notorious to the world at large. "Whether," said *Tindal*, C. J., "the bankrupt be the reputed owner of property or not, can only be known by looking to the acts of the trader, his contracts, and his dealings in his trade—in the world in which he moves. When the jury are satisfied that the usage relied on is notorious to all who are likely to have any dealings with the bankrupt, there is sufficient to warrant their verdict, and the question which they were directed to consider." See also *Ex parte Wiggins*, 2 Deac. & Ch. 269; *Newport v. Hollings*, 3 Carr. & P. 223; *Mullett v. Green*, 8 Carr. & P. 382.

The custom relied upon must however be clearly proved. *Thackthwaite v. Cock*, 3 Taunt. 487, 491. If moreover a custom be one calculated to deceive the public, it will not have any effect. See *Thackthwaite v. Cock*, 3 Taunt. 487, where it was held, that a custom that purchasers of hops from hop-merchants should leave them in the merchant's warehouse for the purpose of resale, upon rent, undistinguished from the merchant's stock, was not such a custom of trade as would prevent the hops from becoming the property of the merchant's assignees in case of his bankruptcy, as being in his posses-

sion, order, and disposition. See also *Shaw v. Harvey*, 1 Ad. & Ell. 920.

A question sometimes arises where goods and chattels have for valuable consideration been vested in trustees upon trust for the separate use of a married woman, and such goods and chattels have been left in her possession in accordance with the terms of the instrument creating the trust, whether upon the bankruptcy of her husband he will be the reputed owner of such goods and chattels. And it seems he will not be so considered, because the trustees by allowing the wife to be in possession of the goods and chattels do not thereby *consent* to their being in the possession, order, or disposition of her husband. See *Simmons v. Bailey*, 16 Mees. & W. 838. There household furniture, linen, and plate belonging to B. were assigned by him, by deed, in contemplation of his marriage, to the plaintiffs, in trust after the marriage, to stand possessed thereof during the joint lives of B. the settlor and his intended wife, for her sole and separate use independently of B. The marriage took place and B. afterwards became bankrupt. The settled furniture and other articles were then in the house in which he resided with his wife. It was held by the Court of Exchequer that they were not at the time of his bankruptcy "in his order and disposition with the consent of the true owners," and that the fact that the furniture, etc., not having been the wife's before the

marriage was immaterial. For the furniture and other articles passed by the deed to the trustees just as if they had been the property of the wife before the marriage, and the possession which followed the deed was right and consistent with its terms. See also *Jarman v. Woolloton*, 3 T. R. 618; *Haselinton v. Gill*, ib. 620 n.; *Darby v. Smith*, 8 T. R. 82; *Quick v. Staines*, 1 Bos. & P. 293; *Ex parte Castle*, 8 Deac. & De G. 117; *Ex parte Massey*, 4 Deac. & Ch. 405; *Gardner v. Rowe*, 5 Russ. 258; *Tugman v. Hopkins*, 4 Man. & Gr. 389.

With regard to choses in action, such as debts, and policies of assurance, which are not capable of actual delivery, such a transfer must be made on a sale or mortgage as is considered equivalent to actual delivery of movables, so as to take them out of the order and disposition of the bankrupt. This is done by giving notice to the debtor, or other person holding the property at the order or disposition of the bankrupt, of the assignment of the debt or other chose in action. The reason why notice is necessary is this, that if it were not given the assignor might by a subsequent assignment, to a party giving notice, transfer the property to him, and consequently by the laches of the person omitting to give notice acquire a false credit, by the debt or other chose in action remaining in his order or disposition. *Jones v. Gibbons*, 9 Ves. 410. Thus in *Ex parte Monro* (Buck, 300) a bond debt was assigned and the bond

delivered to the assignee, but as no notice of the assignment was given to the debtor, it was held by Sir *Thomas Plumer*, V. C., that the debt remained in the order and disposition of the bankrupt. "I find," said his Honour, "the practice of the commissioners has been conformable to the rule stated in *Ryall v. Rolle* (1 Atk. 165); the absence of any decision to the contrary since the time of Lord *Hardwicke* shows that rule to have been acquiesced in, and I think rightly; for the obligee, where notice is not given, may obtain payment of the debt; which is sufficient to leave it in his ordering and disposition within the meaning of the statute."

The same principle was acted upon in *Gardner v. Lachlan* (4 My. & Cr. 129): there A. on behalf of the owner of a ship entered into a charter-party with B., by which B. agreed to pay to A., on the owner's behalf, a certain sum for freight. The owner afterwards assigned all the freight accruing under the charter-party to C. as a security for a debt, and C. gave notice of the assignment to A., but not to B. The owner having subsequently become bankrupt, it was held that the notice given to A. took the arrears of freight out of the order and disposition of the owner. See also *Buck v. Lee*, 3 Nev. & Man. 580; *Ex parte M' Turk*, 2 Deac. 58.

And notice is equally necessary, where debts are assigned by a retiring partner to a partner continuing in the trade. See *Ex parte Burton*, 1 G. & J. 207, and stated *ante*, p. 359; *Ex parte Usborne*, 1

G. & J. 358; *Ex parte Colvill*, Mont. 110; *Ex parte Tennyson*, 1 Mont. & B. 67.

A mere notice, however, to pay debts to one of the partners will not take the debts out of the order and disposition of the firm of which he was a member. Thus in *Ex parte Sprague*, 4 De Gex, Mac. & G. 866, a dissolution of partnership was advertised in the '*Gazette*,' and a circular sent in the name of the dissolved firm, requesting debtors to the firm to pay their debts to one partner. It was held by the Lords Justices of the Court of Appeal in Chancery, that the notice was insufficient to take the debts out of the reputed ownership of the firm. "At the time of the dissolution of the partnership," said *Turner*, L. J., "the debts belonged to the partners jointly. They must have so continued until notice was given to the debtors that the debts which had been joint property, had become the sole property of the one. Now there is nothing in the shape of such notice, except the fact that authority had been given by both partners to the debtors to pay the amount of their debts to one of these partners. I take it that a mere authority of that description would not alter the property between the two. Therefore I think that, as to the debts, there was not here sufficient to take the case out of the operation of the statute as to reputed ownership."

An exception to the general rule has been established in the case of negotiable securities, such as bills

of exchange or promissory notes, which do not require notice to the debtor, in order to take them out of the operation of the clause as to reputed ownership. *Ex parte Price*, 3 Mont. Deac. & De G. 586, 595; *Ex parte Barnett*, 1 De Gex, 203. And it seems that where the acceptor of bills of exchange, indorsed by the drawer, gives a bond in order to secure their payment, and the bond and bills are mortgaged together, notice to the obligor is not necessary, in order to take the bond out of the order and disposition of the mortgagor. *Ex parte Barnett*, 1 De Gex, 203. It should, however, be mentioned that in the case of *Ex parte Price*, 3 Mont. Deac. & De G. 586, which was not cited in *Ex parte Barnett*, notice was held necessary to give validity to a deposit of a warrant of attorney, which was expressed to be executed to secure payment of two bills of exchange, one of which was deposited as part of the security. But in that case it must be observed, that the deposited bill was not indorsed, and the deposittee had only an equitable right to have his security completed by the indorsement of the bill.

Upon the assignment of a chose in action, if there be more than one debtor or trustee, notice ought to be given to all of them, although notice to one of them will, it seems, be sufficient notice to all, so long as the circumstances of the case remain unaltered; but it will not be sufficient upon the death of the individual to whom the notice was given, or in the case of his being a

trustee upon his ceasing to act in that capacity. *Smith v. Smith*, 2 C. & M. 231; *Timson v. Ramsbottom*, 2 Kee. 85; *Meux v. Bell*, 1 Hare, 73; *Wise v. Wise*, 2 J. & L. 403.

The purpose for which notice to a trustee is given, if a notice be in fact given, is altogether immaterial. See *Smith v. Smith*, 2 C. & M. 231: in that case the plaintiff made advances to Maberly, a trader, and afterwards took from him as a security an assignment of an equitable life-interest in stock, and other property standing in the names of and vested in three trustees under a marriage settlement. There being rumours about the solvency of Maberly, the plaintiff, in the course of conversation subsequently to the assignment, and not with a view of giving validity to his security, mentioned to one of the trustees, who was not the acting trustee, that he was secured by the assignment. It was held by the Court of Exchequer that this communication was a sufficient notice to prevent the interest of Maberly passing to his assignees on his bankruptcy, as property in his order and disposition.

It has been held that if the mortgagee of goods and chattels be one of the trustees to whom notice ought to be given, as he must necessarily, from the nature of the transaction, have full notice of his own act, that will be sufficient to prevent reputed ownership. *Ex parte Smart*, 2 Mont. & Ayr. 60, and *Ex parte Smyth*, 3 Mont. D. & De G. 687, and the remarks

thereon in *Ex parte Sketchley*, 1 De G. & Jo. 163.

Notice must also be given to an assurance office of an assignment of a policy, in order to take it out of the order and disposition of the assignor, although the policy be delivered to the assignee, and any rule of the office not to attend to notices is immaterial. Thus in *Williams v. Thorp*, 2 Sim. 257, a policy effected by J. Newman with the Equitable Assurance Company was assigned by him to secure Thorp a sum of money and interest. The policy was given up to the mortgagee, but no notice of the assignment was ever given to the office. Newman became bankrupt. It was held by *L. Shadwell*, V. C., that the assignees in bankruptcy were entitled to the benefit of the policy. "In *Ex parte Munro*," observed his Honour, "the Vice-Chancellor says, 'Did the delivery of the bond by the bankrupt, take away his power to receive the debt? Certainly not.' Supposing that the executor of Newman had obtained payment of the sum insured from the office, could the office have been compelled to pay it over again to Thorp? I see no ground upon which the office could have been compelled to make a second payment. If this society does not take notice of assignments, it takes all the risk of such conduct upon itself." See also *Ex parte Colwill*, Mont. 110; *Ex parte Tennyson*, 1 Mont. & Bligh. 67; *Thompson v. Speirs*, 13 Sim. 469; *In re Bromley*, 13 Sim. 475; *Waldron v. Sloper*, 1 Drew. 193; *Ex parte Patch*, 7

Jur. 820; *Ex parte Price*, 3 Mont. Deac. & De G. 586.

And notice to the insurers is equally necessary where the bankrupts are not the original insurers, but only equitable creditors. See *Ex parte Arkwright*, 3 Mont. Deac. & De G. 129. There the bankrupts being mortgagees of various policies of life assurance, of which the respective offices had notice, deposited them with their bankers to secure the repayment of advances; but the bankers gave no notice of such deposit to the different offices. It was held by *Knight Bruce*, C. J., that the policies must be considered as being in the order and disposition of the bankrupts.

The cases decided by Sir *John Cross*, in which he held that reputed ownership of a policy was a fact to be proved, and was not conclusively to be inferred from the absence of notice to the office of a change of ownership (see *Ex parte Heathcote*, 2 Mont. D. & D. 711; *Ex parte Cooper*, ib. 1), must be considered as overruled by the cases already cited, which establish that notice to the office of an assignment or deposit of a policy is sufficient of itself to take the policy out of the order and disposition of the assignor or depositor.

It has moreover been decided at law, that the question whether a trader was at the time of his bankruptcy the reputed owner of a policy of assurance, is a question of fact, depending not merely upon a notice in writing having been given to the office, but upon a consideration of all the circumstances

attending the possession of the property, at any rate when a verbal notice has been given to the office. See *Edwards v. Scott*, 1 Man. & Gr. 962; 2 Scott, N. R. 266. There trover having been brought by the assignees of Weston, a bankrupt, for a policy of assurance, the defendants pleaded not guilty, and that the plaintiffs were not possessed as assignees; and at the trial it appeared, that in 1836 the policy had been deposited by Weston with the defendants as a security for an advance of money; that in March, 1837, Weston became embarrassed, and a meeting was called of his creditors, at which a list of his debts was read aloud, and handed round the room, which list contained a statement that the policy in question was deposited with the defendants as a security for £3000, from which sum £1200, the estimated value of the policy, was deducted, leaving the defendants creditors for the balance, £1800; that on the 15th of July, 1837 (the fiat being granted on the 27th), an agent of the defendants called at the insurance office, and asked if the premium on the policy had been paid, *at the same time stating that policy had been deposited with the defendants*; that the insurance company kept a book for entering *written* notices of assignments and deposits of policies, which book contained no such entry with respect to the policy in question; and that the insurance office paid no regard to a verbal notice. It was held by the Court of Common Pleas that a direction

by the judge at the trial, that the defendants had not got rid of the apparent ownership of Weston, by what passed at the meeting of the creditors, and by the conversation at the office, not followed up by a notice in writing—was wrong, it being a question for the jury, whether, under those circumstances, Weston was the reputed owner of the policy at the time of his bankruptcy.

It is submitted that in this case, upon proof being given of the verbal notice to the office, it ought to have been laid down as law, that the policy was taken out of the reputed ownership of the bankrupt.

It seems however that the assignees of a bankrupt cannot recover in trover a policy of insurance effected by the bankrupt and deposited by him, before his bankruptcy with the defendants, as a security for money then and previously advanced by them to him. See *Gibson v. Overbury*, 7 Mees. & W. 555, where it was held that an instrument so deposited was not in the order and disposition of the bankrupt with the consent of the true owner. "In the case of a mere lien from a deposit by the bankrupt," said *Abinger*, C. B., "I believe there is no example of the assignees having been held entitled to maintain trover. Our decision in this case will not affect the title of the assignees, who have claimed *the debt*; they may still give a discharge to the office for the debt due upon the policy, to which the bankrupt was entitled, and inasmuch as there was no legal

assignment of the policy. But the lien upon the policy remains unaffected by the bankruptcy; and therefore we think the defendants are entitled to judgment."

With regard to the question what notice of the assignment of a policy of assurance is sufficient, it is clear that notice to the directors as a body would be effectual notice. So notice may be given to an officer representing the company, and the effect of the notice thus received by that officer is sufficient to bind the company even though not communicated to them (*In re Hennessy*, 2 Dru. & Warr. 563, per *Sugden*, L. C.), and even although the notice of the assignment was acquired by the agent in a different capacity, for instance as solicitor for the assignor and assignee. *Gale v. Lewis*, 9 Q. B. 780.

If the agent of the insurance office is himself the assignor, notice to him of the assignment will not, it seems, be sufficient, for he has obviously an interest in withholding it from his employers. *In re Hennessy*, 2 Dru. & Warr. 555, 565. See also *Ex parte Sketchley*, 1 De G. & Jo. 163.

In some cases where the assignor of a policy was a copartner, in consequence of his being entitled to share in the profits of the company, it has been held that the company would, by implication of law, have notice through the assignor, one of its members, sufficient to take the policy out of his order and disposition. See *Duncan v. Chamberlayn*, 11 Sim. 123; *Ex parte Waithman*, 2 Mont.

& Ayr. 364; 4 Deac. & Ch. 412. These cases however have been overruled, and it is clear now that such notice is insufficient. See *Thompson v. Speirs*, 13 Sim. 469; *Ex parte Wilkinson*, ib. 475; *Ex parte Hennessy*, 1 Conn. & L. 559; 2 Dru. & Warr. 555; *Ex parte Arkwright*, 3 M.D. & D. 129; *In re Styant*, 2 M. D. & D. 219.

If a mortgagee of a policy of assurance deposits it by way of submortgage, and gives notice of the submortgage to the insurance office, but not to the original mortgagor, this will be sufficient to take the policy out of the reputed ownership of the mortgagee. *Ex parte Barnett*, 1 De Gex, 194.

Where a bankrupt who was one of the directors of a life assurance office deposited a policy of that office with his bankers, as a collateral security for advances, one of the bankers being also one of the auditors of the assurance office, it was held by the Court of Review that this was sufficient notice to the office so as to prevent the claim of reputed ownership. *Ex parte Waithman*, 4 Deac. & Ch. 412; sed vide *Ex parte Watkins*, 2 Monk. & Ayr. 348.

Where notice of a mortgage of a policy has once been given to an insurance office, it will be sufficient to take the policy out of the order and disposition of the assignor, although no notice may have been given to the office on a subsequent change in the object of the mortgage. See *Ex parte Barnett*, 1 De Gex, 194: there a trader deposited policies of insurance with his bank-

ers to secure the floating balance due from him, and signed a memorandum of the object of the deposit, of which notice was given to the insurance office. Afterwards he took a partner, and the policies remained and were treated as a security for the floating balance due from the firm; but of this change in the object of the security, no memorandum was signed, nor was any notice given to the office. It was held by Sir *J. L. Knight Bruce*, C. J., that the bankers were entitled to the usual order, as in the case of an equitable mortgage without a written memorandum. "I am of opinion," said his Honour, "that although of that change the office had not notice, the policy was nevertheless not in the order and disposition of the bankrupt, that being effectually prevented by the prior notice rendering it impossible to deal with the policy without making inquiries."

It is usual and indeed advisable to give notice of an assignment of a policy to the office in writing, nevertheless a verbal notice is sufficient, even although it be not entered in the books of the office (*Ex parte Tunner*, 1 Bank & Ins. Rep. 156; and see *Re Raikes*, 4 Deac. & Ch. 412; *Edwards v. Scott*, 1 Man. & Gr. 962; 2 Scott, N. R. 266; *Ex parte Masterman*, 4 Deac. & Ch. 767); but whichever mode is adopted, it ought to be a clear and distinct notice. Thus a mere direction that all letters from the insurance office are to be sent to a particular person, and that the

premiums will thenceforth be paid by him, will not amount to a sufficient notice of an assignment to the client of such person. See *West v. Reid*, 2 Hare, 249: there Daniell in 1816 assigned a policy of insurance on his life to a trustee, to secure a sum of money owing to Woodroffe, and soon after the solicitor of the latter caused a memorandum to be entered in the office of the insurance company, directing that all letters were to be sent to such solicitor, and the premiums were thenceforth paid by Woodroffe through the hands of such solicitor; but the insurance company were *not* informed on whose behalf the solicitor acted. In 1826, Daniell became bankrupt, and his assignees declined to interfere respecting the policy. The premiums continued to be paid by Woodroffe through his solicitor, during his life, and by the executors of Woodroffe through their bankers after his death. Daniell died, 1839. It was held by Sir *James Wigram*, V.C., that the policy was in the order and disposition of the bankrupt, and that there was not any notice given to the insurance office of the assignment of the policy to take it out of such order and disposition. See also *Burridge v. Row*, 1 Y. & C. C. C. 183.

So likewise in the case of *Ex parte Carbis*, 4 Deac. & Ch. 354: a party to whom the bankrupt had assigned a policy of assurance, sent an agent to the office for the purpose of paying the annual premium, who, in the course of conversation

with one of the clerks in the office, told him of the policy having been so assigned. It was held that this notice was not sufficient.

It has however been held that the slightest circumstance of notice is sufficient. Thus a letter to a secretary of an insurance company, in which the writer says, "I am holder of the under-mentioned policies," and inquires what the office will give for them, is sufficient notice of an assignment. *Ex parte Stright*, Mont. 502; 2 Deac. & Ch. 314.

The fact that one of the parties to an assignment of a policy is an agent for the assurance office, will not amount to constructive notice of the assignment to the office, if he was not an agent for that particular purpose. *Ex parte Patch*, 7 Jur. 820. So where an insurance has been effected in a central office of the company, notice of an assignment to an agent in a country office, connected with the central office, will not be sufficient (*In re Hennessy*, 2 Dru. & Warr. 555), *à fortiori*, if the agent be himself also the assignor of the policy. *Ib.*

Where the same person is secretary to two insurance companies, it seems to be doubtful whether his knowledge of a deposit of shares acquired by him as secretary to one of the companies, amounts to notice to the other, so as to prevent the operation of the clause as to reputed ownership. *Ex parte Bignold*, 3 Deac. 151.

On a deposit of a policy of assurance by way of equitable mortgage, the onus does not lie on the mortgagee to show that notice of

the deposit was given to the office before the act of bankruptcy, but with the assignees to show that it was not. *Ex parte Stevens*, 4 Deac. & Ch. 117.

Shares in a public company being, as already observed (*ante*, p. 403), personal property, will remain in the order and disposition of a bankrupt, unless upon a transfer of them he has complied strictly with the forms required by the provisions of the Act of Parliament constituting such company (*Ex parte The Lancaster Canal Company*, 1 Deac. & Ch. 411; 1 Mont. & Bligh, 94); and although the act only expressly relates to transfers between third parties, yet it impliedly relates to cases where the company are the transferees. *Ib.*

Upon a deposit or mortgage of shares, they will be taken out of the order and disposition of the mortgagor or depositor, by proper notice being given to the directors or to their secretary (*Ex parte Harrison*, 3 Deac. 185; *Ex parte Dobson*, 2 Mont. D. & De G. 685; *Ex parte Richardson*, 3 Deac. 496; *Ex parte Rayner*, 1 Bank. & Ins. Rep. 256), otherwise they will be considered as being in his order and disposition. *Ex parte Spencer*, 1 Deac. 468; *Ex parte Nutting*, 2 Mont. Deac. & De G. 302; *Ex parte Vallance*, 2 Deac. 354; *Cumming v. Prescott*, 2 Y. & C. Exch. Ca. 488.

Where shares of a company stand in the name of the bankrupt, who is on all occasions the only apparent owner, and has possession of the certificates of the shares,

but the shares belong to another, in whose favour there exists a secret declaration of trust, the shares will be in the reputed ownership of the bankrupt. *Ex parte Watkins*, 2 Mont. & Ayr. 348; 1 Deac. 131, reversing S. C. 1 Mont. & Ayr. 689; 4 Deac. & Ch. 87. See also *Ex parte Ord*, 1 Deac. 166; 2 Mont. & Ayr. 724.

Where the person who mortgages shares in a company is the person to whom notice is in ordinary cases given, it seems that notice to him of such a transaction is not sufficient, but it should be given to the company. Thus in *Ex parte Sketchley*, 1 De G. & Jo. 163, a holder of shares in a railway company, which was subject to the provisions of the Companies Clauses Consolidation Act, 1845, was one of the secretaries of the company and a solicitor. He borrowed money of a client on a deposit of the certificates of the shares, but no further notice of the deposit was given to the company. On the solicitor becoming bankrupt, it was held by the Lords Justices of the Court of Appeal in Chancery, that the shares were in his order and disposition with the consent of the owner, his client. "The question," said Lord Justice *Turner*, "is whether there was sufficient notice to the company; and I am of opinion that there was not. Notices of this description operate not only to prevent the property, which is the subject of the notice, being disposed of without the knowledge of the person by whom or on whose behalf the notice is given,

but also to prevent injury to other persons from subsequent dealings with the property, affected by the notice, in ignorance of the prior claim upon it. It is the duty therefore of the person by whom or on whose behalf the notice is given, to take care that it reaches the person who has the control over the property which it affects; and this, I think, cannot be said to have been done, where, there being other and more effectual means of giving notice, it has been given only to a person who has an interest in withholding it. Lord *St. Leonards* has intimated a strong opinion to that effect in *Ex parte Hennessy* (2 Dru. & W. 55), and I agree in that opinion. Besides, in this case I think there was no intention to give notice to the company. The respondent was dealing with the bankrupt as his solicitor, and there was no intention that the company should be affected by that dealing. That the bankrupt was bound, by his position, to give notice to the company cannot affect the case."

The doctrine of reputed ownership is applicable to cases where a secret partner leaves the goods and chattels belonging to the firm in the order and disposition of the ostensible partner. See *Ex parte Enderby*, 2 B. & C. 389: there A. and B. were partners, but the whole of the business was carried on in the name of A. alone, B. never appearing to the world as a partner; and at the dissolution of the partnership by effluxion of time, all the partnership stock and

effects, by agreement between them, were left in A.'s hands, who was to receive and pay all the debts due to and from the concern, and to repay, by instalments, the capital brought in by B. The business was carried on by A. for a year and a half the same as before, when he became bankrupt. It was held by the Court of King's Bench, that all the partnership property and effects so left in A.'s hands, and also the debts due to the concern, were in his order and disposition. See also *Smith v. Watson*, 2 B. & C. 401; *Ex parte Chuck*, 8 Bing. 469, 472.

The result is the same where one of two partners allows goods and chattels of his own to be used as partnership property. *Ex parte Hare*, 1 Deac. 16; *Ex parte Arbouin*, 1 De Gex, 359; *Ex parte Davenport*, Mont. & B. 165.

But the doctrine is not applicable where there has been an absolute assignment to the partner in possession of the goods, because there he is the real owner (*Ex parte Gurney*, 13 L. J., n. s., Bank. Rep. 17; and see *Ex parte Wood*, 1 De Gex, 134; *In re Brewster*, 22 L. J., n. s., 62, Bank. Rep.), nor where two persons being joint owners of goods and chattels, on one becoming bankrupt such goods and chattels are in the possession of the other. *Ex parte Vardon*, 2 Mont. D. & D. 694.

Where the goods and chattels are vested in trustees, notice should be given to them of the assignment. *Matthews v. Gabb*, 15 Sim. 51; *Ex parte Smyth*, 3 M. D. & D. 687.

Where a fund in the Court of Chancery is assigned, a stop order should be obtained by the assignee to take it out of the order and disposition of the assignor, *Bartlett v. Bartlett*. 1 De Gex & Jo. 127. See cases collected, 2 Lead. Cas. Eq. 672.

If the right to publish a newspaper be assigned by way of mortgage, it seems that the proper way to take it out of the reputed ownership clause would be to give notice of the assignment at the Stamp Office, where the proprietorship of the newspaper is registered. *Ex parte Foss*, 2 De G. & Jo. 230; and see 5 Jarm. Byth. 269, 3rd ed.

8. *What is meant by the Consent and Permission of the true Owner.*

—The meaning of that part of the clause referring to goods and chattels in the possession, order, or disposition of the bankrupt, "with the consent and permission of the true owner, is well explained in the principal case of *Joy v. Campbell* (*ante*, p. 398), viz. that it is where a person who is *not* the owner to whom the chattels do not properly belong, and who ought not to have them, is permitted by the owner, unconscientiously as the act supposes, to have such order and disposition."

The first question which generally arises in discussing this question is, Who is the true owner? It is clear that the person who is the purchaser or even the mortgagee of goods is the true owner. *Eyall v. Rowles*, 1 Ves. 348; 1 Atk. 165; 2 Lead. Cas. Eq. 615.

The assignee of a bankrupt is the true owner of his "goods and chattels;" if therefore he permits them to remain in the order and disposition of the bankrupt as reputed owner, they are liable to be seized upon a subsequent insolvency by the assignee of the Insolvent Debtors' Court. *Butler v. Hobson*, 4 Bing. N. C. 290; 5 Scott, 824. See also *Ex parte Jungmichael*, 2 Mont. D. & De G. 471; *Ex parte Butler*, ib. p. 781.

But in such a case, if the true owner has no knowledge of or means of knowing the bankrupt's interest, consent on his part cannot be implied. Therefore where a bankrupt, upon the occasion of a previous insolvency, suppressed the circumstance of his being entitled to a reversionary interest in a legacy, and excluded it from his schedule, and it did not appear that the assignee in insolvency had any knowledge of that circumstance, the latter was held by Sir W. Page Wood, V. C., to be entitled notwithstanding his title had not been perfected by notice to the trustee, his Honour being of opinion under the circumstances that there were no laches on his part (*In re Rawbone's Trust*, 3 K. & J. 476); but it seems that laches on the part of the assignee in insolvency would have been equivalent to consent within the meaning of the rule. *Id.*

Where however a bankrupt had agreed to pay his creditors in full, and gave bills for the amount, and the creditors executed a power of attorney to one A. B. to receive their dividends for the bankrupt's use.

The bills not being paid, it was held by the Court of Review that the creditors, and not A. B., were entitled to the dividends, and a second commission having issued, that the dividends were not in the reputed ownership of the bankrupt. *Ex parte Smither*, 3 Mont. & Ayr. 693.

A trustee having the legal right to the possession of the property, and the power of dealing with it, will be considered as the "true owner," so that his consent and permission "will be sufficient although his *cestui que trusts* be infants." *Ex parte Dale*, Buck, 365. An able writer however has expressed a different opinion, observing that "whether the permission of a *bare trustee* can be said to be that of the 'true owner,' to the prejudice of innocent *cestuis que trust*, is a question of some difficulty, but which upon principle should, it is conceived, be answered in the negative." Lewin on Trustees, 278, 3rd ed.; and see cases there cited.

A *cestui que trust* absolutely entitled is, it seems, the true owner, so that if he leaves the goods and chattels to which he is entitled in the possession of the trustee, they will be considered as being in his reputed ownership. *Ex parte Burbridge*, 1 Deac. 131; 4 Deac. & Ch. 87.

A true owner in order to give consent must have a capacity for doing so; hence as infants cannot give consent, goods and chattels belonging to them in possession of a party who becomes bankrupt will

not be considered in his reputed ownership. *Viner v. Cadell*, 3 Esp. 88.

The goods of a woman married to and living as wife with a person who becomes bankrupt or insolvent, he having a former wife living, would not, it seems, pass to his assignees (although such goods were in his possession) if she were ignorant of the former marriage. But if she allowed him the control and management of her property after discovery of the former marriage, such property would, as is laid down in the principal case of *Mace v. Cadell*, pass to his assignees. *Miller v. Demetz*, 1 Mood. & Rob. 479.

Assuming the real owner to have a capacity to consent, it must appear that the bankrupt had possession with such consent. Thus in *Ex parte Bell*, 1 De Gex, 577, some oil merchants gave a lien on oil belonging to them in the hands of other persons to a creditor, who, trusting to an incorrect representation of the oil merchants, delayed taking possession or giving notice of lien, and the merchants repossessed themselves of the oil, mixed it with their general stock, and became bankrupt. It was held by Sir J. L. K. Bruce, V. C., that the lien was good, and that the oil was not in the order and disposition of the bankrupts with the consent of the true owners.

Upon the same principle, in *Load v. Green*, 15 M. & W. 216, where a person bought goods with the fraudulent intention of never paying for them, and kept them until

his bankruptcy, it was held by the Court of Exchequer, that they did not pass to the assignees under the fiat, as having been in the possession, order, and disposition of the purchaser with the consent of the true owner. "In order," said Parke, B., "to bring the case within the statute, there must be a real owner, distinct from an apparent owner, and the real owner must consent to the apparent ownership *as such*; they never contemplated the permitting the bankrupt to obtain a credit by means of the possession and apparent ownership of property which really did not belong to him. They intended to part with the property itself, and to divest themselves altogether of all right to it; and although, in consequence of the bankrupt's fraud upon them, they had a right to annul the contract, and be again the real owners, that right they did not exercise until after the bankruptcy; and consequently at the time of the act of bankruptcy (upon which the title of the assignees depends) the bankrupt was not apparent owner, but real owner, and the statute does not apply. It is to be understood that these observations are not meant to affect that class of cases in which the real owner gives, not the possession only, but an interest to the bankrupt, as where he leaves the goods, under such circumstances as that the possession will necessarily, according to the habits of society, carry with it the repute of absolute ownership. These cases proceed upon the prin-

ciple that the true owner does consent to an apparent ownership in the bankrupt contrary to the truth, because that is the natural result of the consent which he gives. Whether or not this peculiar case would have fallen within the statute if the plaintiff had discovered the fraud long before the act of bankruptcy, and omitted, for an unreasonable time before that period, to avail themselves of the right to rescind the contract, is no question in the present case; for the act of bankruptcy followed the sale and delivery within a short time." See *Ex parte Gawan*, 25 L. J. Bank. 1; *Ex parte Geaves*, 25 L. J. Bank. 53.

So where goods sold to a person who afterwards becomes bankrupt are stopped *in transitu*, they will not come within the reputed ownership clause, because it refers to cases where the bankrupt shall, "by consent and permission of the true owner," have goods in his possession; whereas in the case before mentioned, the bankrupt, if he has possession, is himself the true owner, under the contract of sale. *Townley v. Crump*, 5 Nev. & Mann. 606; 4 Ad. & Ell. 58.

Goods will not be deemed to be in the possession of a trader with the consent of the true owner, if the latter takes every possible pains to obtain possession of them. Thus in *Belcher v. Bellamy*, 2 Excheq. 303, Hawkins, who resided in Australia, being indebted to Hannen in the sum of £771. 3s. 4d., the latter on the 8th of January, 1844, *bond fide* and for valuable

consideration, assigned the debt to Winsland, and on the 22nd of January joined Winsland in a letter notifying to Hawkins the assignment, and requiring him to pay the debt to Winsland. This letter was posted on the 1st of February, 1844, in the ordinary way in which letters to New South Wales are posted, and could not have reached Australia before the 10th of February, on which day a fiat in bankruptcy was issued against Hannen. On the 29th of January, 1844, Hawkins remitted by letter £50, which was received after the fiat, and delivered over to Winsland. The assignees of Hannen having sued Winsland for the amount, it was held by the Court of Exchequer that Winsland having taken every possible step to obtain possession of the debt, it could not be said to remain in the order and disposition of the bankrupt with the consent of the true owner. "A person purchasing a chose in action," observed *Rolfe*, B., "is considered to leave it in the possession of the debtor, unless he is active and gives notice; although, if he takes every possible step to give notice, and the debt nevertheless remains in the possession of the bankrupt, it does not so remain with the consent and permission of the purchaser. If, as was suggested by Mr. *Bramwell*, he does not give notice for three months, during that period the debt remains in the order and disposition of the debtor; but the moment he gives notice, it is otherwise; and the fact, that many months must elapse

before the notice can take effect, does not alter the case."

So notice given of a previous assignment of shares in a public company before the act of bankruptcy will be sufficient to take the shares out of the reputed ownership of the assignor. *Ex parte Littledale*, 6 De G. Mac. & G. 714.

Upon the same principle, in *Brown v. Heathcote*, 1 Atk. 160, a debtor having assigned to his creditor certain goods in two ships then at sea, and delivered to him the bills of lading and invoice; and the debtor having become bankrupt, it was held by Lord *Hardwicke*, C., that as everything which could show a right to the goods had been delivered over to the creditor, the bankrupt could not be said to have the order and disposition of the goods with the consent of the true owner. See also *Carruthers v. Payne*, 5 Bingh. 270, 277.

4. *As to the Time at which Goods and Chattels must be in the Possession of the Bankrupt to come within the Clause.*—In order to bring a case within the clause, the possession of the reputed owner, with the consent and permission of the true owner, must continue up "to the time he becomes bankrupt," and by that is meant the time of the committing of any act of bankruptcy capable of supporting the adjudication, though such act be prior to the act on which the adjudication is founded. *Lyon v. Weldon*, 2 Bing. 334; 9 Moore, 629; *Fawcett v. Fearn*, 6 Q. B.

20; *Stansfeld v. Cubitt*, 2 De G. & Jo. 222; *Price v. Groom*, 2 Exch. 542; *Ex parte Marjoribanks*, 1 De Gex, 466.

It must however be remembered that where the true owner takes goods out of the "possession, order, or disposition of a bankrupt, after a secret act of bankruptcy, but before the date of the fiat, or the filing of the petition, the true owner may retain such goods, under the 183rd section of 12 & 13 Vict. c. 106." See *Ex parte Smith*, *In re Styan*, 2 M. D. & De G. 213, 219; *Pariente v. Pennell*, 2 M. & Rob. 517; *Ex parte Marjoribanks*, 1 De G. 466; *Young v. Hope*, 2 Exch. 105. In the recent case of *Graham v. Furber*, *Maule*, J., 14 C. B. 155, made the following important observations on the construction of this section:—"It seems to me that the goods in this case, not being in the possession, order, or disposition of the bankrupt at the time of the filing of the petition, and the true owner not having notice of any act of bankruptcy, they are remitted to the situation they would have been in before the act, if they had ceased to be in the possession of the bankrupt before an act of bankruptcy. It was thought, and justly thought, to be hard against the true owner of goods, where he had *bonâ fide* allowed the trader to have the possession, order, or disposition of them, that they should be taken away from him, and disposed of for the benefit of the creditors, merely because he had not been churlishly strict in not allowing

anybody to use the goods but himself. It was the intention of the legislature, by this statute, to relieve such a person, and to place him in as good a position where he got back his goods *before notice of an act of bankruptcy*, as if he got them back *before the commission of an act of bankruptcy*. When he got his goods back, they were taken to have been got back before an act of bankruptcy, if got back *without notice* of an act of bankruptcy. The words of the 133rd section, 'All contracts, dealings, and transactions by and with any bankrupt really and *bonâ fide* made and entered into before the date of the fiat or the filing of such petition,' are sufficient for this purpose. It is a 'transaction' between the bankrupt and the true owner of the goods, when the latter resumes possession of them. This construction of the act makes the law simple and clear, and in conformity with the rule as to all other transactions." See also *Re Atkinson*, Fonb. Bank. Rep. 246.

And even if before the date of the fiat, and before notice of an act of bankruptcy, the true owner has *bonâ fide* demanded possession of the goods, and communicating with the bankrupt, has done that which would show that the goods did not longer, *with his consent and permission*, remain in the possession, order, and disposition of the bankrupt, the title of the true owner would not be defeated by a prior secret act of bankruptcy (5 Ell. & Bl. 237).

But a *mere intention* to demand the goods and to get possession of

them will not amount to a "*dealing*" or "*transaction*" within the meaning of the 133rd section of the Bankrupt Act, so as to take the goods out of the operation of the reputed ownership clause. *Brewin v. Short*, 5 Ell. & Bl. 227, 238.

5. *Exceptions from the Operation of the reputed Ownership Clause.*—

Where a person has possession of property in *auter droit*, as executor or administrator, or as husband of an executrix or administratrix, the reputed ownership clause will not be applicable. *Ludlow v. Browning*, 11 Mod. 138; *Ex parte Marsh*, 1 Atk. 158; *Ex parte Ellis*, ib. 101; *Viner v. Cadell*, 3 Esp. 88. "If," says Lord *Mansfield*, "an executor becomes bankrupt, the commissioners cannot seize the specific effects of his testator; not even in money, which specifically can be distinguished and ascertained to belong to such testator, and not to the bankrupt himself." *Howard v. Jemmet*, 3 Burr. 1369; see also *Farr v. Newman*, 4 T. R. 648; *Serle v. Bradshaw*, 2 C. & M. 148; 4 Tyrwh. 69.

Where, however, a person keeps possession of the property of a deceased person, as executor *de son tort*, with the consent of a person who might have taken out administration, upon the bankruptcy of the former, such property will pass to his assignees. Thus, in *Fox v. Fisher*, 8 B. & Ald. 185, Mary Fish, an innkeeper, died intestate in 1807, and her son took possession of the inn and furniture, and carried on the business until 1819,

when he became bankrupt, and the defendants, as his assignees, took the goods and sold them. The son never took out letters of administration to his mother. After the bankruptcy, a creditor of Mary Fish took out letters of administration to her, and in an action of trover claimed the goods from the assignees. It was held, however, that the assignees were entitled to them. "Here," said *Abbott*, C. J., "the son was entitled to take out letters of administration to his mother, and if he had so done, he would have vested in himself a complete legal right. Now, a creditor of the mother might either have brought an action against him as executor *de son tort*, or might have cited him before the Ecclesiastical Court, to show cause why the creditor, and not the son, should be constituted administrator. Neither of these things was done, and the son continued in possession of these goods for nearly twelve years. I think, therefore, that these goods were clearly within 21 Jac. I. c. 19, as being, with the consent of the true owner, in the possession, order, and disposition of the bankrupt. The case of *Fairclaim d. Allen v. Little* (C. P. H. 58 Geo. III., cited 3 B. & Ald. 136) is distinguishable, because there the person in possession was not entitled to take out letters of administration; but here the bankrupt was so entitled." See also *Ray v. Ray*, Sir G. Coop. 264. *In re Thomas*, 3 M. D. & De G. 40; 1 Ph. 159, overruling S. C. 2 M. D. & De G. 294. *White v. Mullett*, 6 Exch. 713; *Ex parte*

Moore, 2 Mont. Deac. & Dé G. 616, and *post*, 429.

Where a person at the time of his bankruptcy is in possession of goods and chattels as trustee, inasmuch as the possession is according to the ownership, the case will not fall within the reputed ownership clause; for in order to do so, there must be possession of a person not the owner, with the consent of another person, the true owner. This is well explained in the principal case of *Joy v. Campbell*: there, it will be observed, Thomas Brown held shares in a trading company in trust for his brother William, who, by his will, after giving certain legacies, bequeathed the residue to his brother Thomas, who continued in possession of the shares and acted as executor. Thomas afterwards became bankrupt. It was held by Lord *Redesdale*, that the shares were not within the reputed ownership clause, inasmuch as Thomas was himself "the true owner and proprietor thereof," subject, however, to the debts and legacies of William. In the case of *In re Bankhead*, 2 Kay & J. 560, a sole trustee who had appropriated £4000, part of the trust property deposited in the box in which he kept the trust deed and the securities for other portions of the trust funds, two policies of assurance, one on his own life for £2000, the other on the life of his father for £3000, enclosing them in an envelope with a memorandum, that in the event of his, the trustee's death, the amount of the enclosed policies was to be applied

to the repayment of £4000 borrowed by him of the *cestui que trust*. Six years afterwards, the trustee became bankrupt. The policy for £2000 was found by the officer of the Court of Bankruptcy enclosed with the memorandum in the box, the other policy having been paid to the bankrupt upon his father's death. It was held by Sir *W. Page Wood*, V.C., that as between the *cestui que trust* and the assignees in bankruptcy:—First, that notwithstanding the words importing contingency, the memorandum was a valid declaration that the policy was, in any event, subject to the trusts of the settlement. And, secondly, that there being a valid declaration of trust by the sole trustee, he was the proper person to be in possession of the policy, in other words “the true owner” within the meaning of 12 & 13 Vict. c. 106, and he being also in the reputed possession of the property when the bankruptcy took place, there was no separation of interests—the true owner and reputed owner were the same person, and the 125th section of the Act did not apply. See also *Sinclair v. Wilson*, 20 Beav. 324.

If a trustee were to blend trust funds with his own, and to sell out part of the funds, it would be presumed that those remaining unsold belonged to the trusts, and were not in the order and disposition of the trustee at the time of his bankruptcy. “If,” says *Wigram*, V.C., “£20,000 consols were standing in the name of a party who was trustee of one moiety and beneficial

owner of the other moiety, and that party were to sell and transfer £10,000 of the stock, it cannot, I think, be doubted for a moment, that a court of equity would, as against the trustee and his assignees in bankruptcy, hold that the £10,000 transferred was the property of the bankrupt, and that the remaining £10,000 was not the property or in the order and disposition of the bankrupt, but was subject to the trust.” *Pinkett v. Wright*, 2 Hare, 129.

Where however goods and chattels are in the possession of a trustee contrary to the title, they will not be considered as trust property. See *Ex parte Moore*, 2 Mont. Deac. & D. 616: there residuary estate was bequeathed to the testator's widow and two other trustees (also the executors and executrix of the will), upon trust to be converted with *all possible speed* into money, to be laid out in the purchase of an annuity for the lives of the widow and children; and the trustees were directed to pay the annuity to the wife, for the sole use and benefit of the children. After the testator's death the widow was permitted by the acting trustee to retain possession of furniture, part of the residuary estate, and *eight years* after the testator's death she married again, and took the furniture to the husband's house, where the testator's children resided with her, and after six years more the second husband became bankrupt. It was held by the Court of Review in bankruptcy that the trustees could not claim

the furniture from the assignees. "I think," said Sir *J. Cross*, "that this trust was never considered as having any existence before the bankruptcy occurred, which was fourteen years after the property was given to the widow to be converted into money as soon as possible. I consider it as property which she thus appropriated to herself and made her own. She was responsible to the children for her administration of the estate, and of course did not get rid of that responsibility by her conversion of the property to her own use. But I am of opinion, that the property, as regards the world at large, had long since ceased to be the property of the testator. The case of *Quick v. Staines* (1 B. & P. 293) is decisive of the question; there, exactly as occurred in this case, the executrix used the goods of the testator as her own, and afterwards married, and then used the goods as those of herself and her husband, and it was decided, that they might be taken in an execution against the husband. Therefore by the general law, independently of the Bankrupt Act, the point is settled against the petitioners."

And where a person holds goods and chattels upon a secret trust for another, who is the absolute owner of them, the exception in favour of trust property will not apply. See *Ex parte Burbidge*, 1 Deac. 131. There it appeared by a special case that by the rules of an insurance company no person except a director was permit-

ted to hold more than two shares in his own name. A proprietor who was already the holder of two shares, having purchased two others, caused them to be entered in the name of the bankrupt in the company's books, with the knowledge of one of the directors and the actuary. The bankrupt signed a declaration of trust, that he held the shares as trustee for the proprietor, but no notice of the trust was taken in the books of the company, and the bankrupt held the certificates of the shares, and continued to receive the dividends thereon, accounting for them from time to time to the proprietor, up to the period of his bankruptcy, when the shares were still standing in his name, during all which time he was treated as owner by the company, had notice of meetings served upon him, attended meetings of the shareholders, and voted as a shareholder. It was held by the Lords Commissioners, reversing the decision of the Court of Review (reported 4 Deac. & C. 87), that the shares were in the order and disposition of the bankrupt as reputed owner. "There was," said Lord Commissioner *Shadwell*, "no open or honest purpose, like the payment of debts, to be answered by this trusteeship, as in *Copeland v. Gallant*, (1 P. Wm. 314), nor was there any trust for the benefit of third persons, or created by third persons, as in *Ex parte Martin* (2 Rose, 331; 19 Ves. 491) and *Ex parte Horwood* (1 Mont. & M. 169). But the trust was created by the proprietor of the

shares for his own sole benefit, and for no other purpose, than that of enabling him to hold more shares than he was allowed by the regulations of the company to hold in his own name. No convenience to society is promoted by such a trust, and great injury to the public may be occasioned by the delusive credit which it confers. It does not appear to us, that the private knowledge which one of the directors and the actuary had of the transaction, could operate as notice of this secret trust to the company, who in fact treated the bankrupt as owner. For anything that appears to the contrary, the dividends were received by the bankrupt. And the shares might have been sold by him, without the intervention of the directors or the actuary. We are of opinion that such a *secret trust* is not within the meaning of the reputed ownership clause in the Bankrupt Act, but is to be considered as a case of property left in the possession, order, and disposition of the bankrupt, with the consent of the true owner, thereby inducing a reputation of ownership within the meaning of that act."

Another exception, as is laid down in the principal case of *Mace v. Cadell*, is where a person holds goods as a factor. Thus in the recent case of *Whitfield v. Brand*, 16 M. & W. 282, the author of a book deposited with a bookseller 1500 copies of it to be sold by commission. The bookseller became bankrupt. It was held by the Court of Exchequer

that the unsold copies did not pass to the assignees. "It is," said *Parke*, B., "notoriously the practice of booksellers to sell books received by them to be sold on commission. That would rebut the inference that the defendant held these particular goods as owner. But had there been no such evidence, I should not think that these books passed to the assignee, as it is well known that booksellers act also in the capacity of factors. It appears to me that, in this case, the bankrupt received the deposit of the books in question, not as owner, but as factor, and as such he had possession, but with authority to sell, and that is enough to take it out of the statute. It was said, that as he was not shown by the plaintiff to have been known to the world to be such factor, the books would pass to his assignees in respect of his reputed ownership; but that is not so; for if booksellers sometimes act as factors, and it is part of their business to sell books of which they are not the owners, no one had a right to presume these books to be his own without inquiring how the case really stood. Besides, as to the necessity of notoriety, there was enough evidence here to show that all persons interested were put upon inquiring whether the bankrupt held the books as factor or owner. The question of reputed ownership does not arise on these facts. In a very early case on the bankrupt laws, *Mace v. Cadell* (Cowp. 232), it was held that the stat. 21 Jac. I. c. 19, s. 11, did not

extend to the case of factors who have the possession of other men's goods merely as trustees, or under a bare authority to sell for the use of their principal. The goods must be such as the party suffers the trader to sell as his own."

And if goods sent to a factor's be sold and reduced into money, if the money be in separate bags and distinguishable from the factor's other property, the principal may recover it in specie, and is not driven to the necessity of proving his debt in bankruptcy. Per Lord *Kenny*, C.J., in *Tooke v. Hollingworth*, 5 T. B. 227.

Where a bankrupt is in possession of the goods of another *bona fide* with the consent of the owner at the time of the bankruptcy, for a *specific purpose*, beyond which he has not the right of disposition or alteration, that is not such a possession as comes within the meaning of the reputed ownership clause. See *Collins v. Forbes*, 3 T. B. 316: there Kent by arrangement with Forbes and Co. being about to enter into a contract to erect a stage for rolling barrels on board shipping for the Victualling-office, Forbes and Co. agreed that upon his doing so, Kent was to have one-fourth of the clear profit of the contract, and a guinea a week for his superintendence of the work, and Forbes and Co. were to supply the timber and to have the residue of the profits. Kent accordingly entered into the contract with the commissioners, and Forbes and Co. shipped the timber in their own name to the yard, where it was

delivered as for Kent's use, and received by the king's officers as such, and they swore that they would not have received it on account of any other person; but that they would not have permitted even Kent to dispose of it in any other manner than for the work contracted for, except such parts of it as were found unfit for the intended purpose, because they considered it as delivered for the purpose of the contract. Before the work was finished, Kent became a bankrupt, on which Forbes and Co. got possession of the timber. It was held that the assignees of Kent were not entitled to recover the timber under 21 Jac. I. c. 19. "In the present case," said *Ashurst, J.*, "there never was any sale of the timber to Kent, nor any *general delivery*, so as to give him the absolute disposition of it; for it appeared in evidence that the store-keepers in the yard would not have permitted even Kent to have sold the timber to any other person, unless any part of it had been unfit to be used in performing the contract, as they considered that it was delivered only for the purpose of the contract. Therefore there could be no danger that Kent's creditors would be induced to trust him on the credit of that property, or as supposing it liable to their debts. The possession which he had (as it appeared by the facts in the case) is somewhat similar to that of a carpenter, who receives timber to convert into a waggon, or of a tailor, to whom cloth is sent for the purpose of

being worked up. And it is a very different case from that of a person making a sale of any part of his property, and yet continuing in possession and taking upon him the disposition of it with the consent of the vendee; for in such case, as the *property was originally his*, and there never was any visible alteration in it, it is a snare to induce persons to give him credit, to which the vendee, by his neglect to obtain the possession, lends his assistance, as he concurs in giving a false appearance to the transaction. But in the present case, this timber came into Kent's possession in the natural course of the transaction, in which there was no fraud either actual or constructive, for it appeared by the evidence that the timber was originally sold to the defendants on their own account, and that the vendor did not know that the bankrupt had any concern in the transaction." See also *Rex v. Egginton*, 1 T. R. 370; *Ex parte Carlon*, 4 Deac. & Ch. 120; *Clarke v. Spence*, 4 Ad. & Ell. 448. See also and consider *Ex parte Batten*, 3 Deac. & Ch. 328; *Newport v. Hollings*, 3 Carr. & P. 223.

Upon the same principle cheques (*Moore v. Barthrop*, 1 B. & C. 5), bills of exchange, or promissory notes (*Belcher v. Campbell*, 8 Q. B. 1; *Buchanan v. Findlay*, 9 B. & C. 738; 4 Man. & Ry. 593; *Bruce v. Hurly*, 1 Stark. 23; and see *Took v. Hollingworth*, 5 T. R. 215), placed in the hands of a person for a specific purpose, will not be considered as being within his reputed ownership.

It has been already stated that bills of exchange are considered "goods and chattels" within the meaning of the reputed ownership clause; it is important to consider when, on being deposited by the owner with another, they fall within its operation. In the first place it is clear that where bills are remitted to an agent, as a factor or banker, and entered short while unpaid, and bills paid in generally to be received, and not to be discounted or treated as cash, are not affected by the bankruptcy of the factor or banker, the property in them is not altered, and the bills, or the proceeds thereof, if received by the assignees, must be returned to the principal, subject to such lien as the factor or banker may have upon them. *Zinck v. Walker*, 2 Sir W. Black. Rep. 1154; *Brown v. Kewley*, 2 B. & P. 518; *Took v. Hollingworth*, 5 T. R. 215; *Bent v. Puller*, ib. 494; *Parke v. Eliason*, 1 East, 544, 550; *Ex parte Waring*, 19 Ves. 345; *Buchanan v. Findlay*, 9 B. & C. 738; *Ex parte Pauli*, 3 Deac. 169.

Where bills are delivered to a banker expressly for the purpose of their being discounted, or if in the course of dealing between the customer and banker, bills received by the latter are regarded by both parties as cash, *minus* the discount, and the customer is at liberty to draw on account thereof, beyond the amount of cash in the hands of the banker, then in the event of the bankruptcy of the banker, the assignees will be entitled to the bills. *Carstairs v. Bates*, 3 Campb. 301; *Ex parte Rowton*, 17 Ves. 426,

431; 1 Rose, 15; *Ex parte Sollers*, 18 Ves. 229; *Ex parte Thompson*, 1 Mont. & M. 102. So likewise in *Hornblower v. Proud*, 2 B. & Ald. 327, a person having three bills of exchange, applied to a country banker with whom he had no previous dealings, to give for them a bill on London of the same amount, and the bill given by the banker was afterwards dishonoured. It was held by the Court of King's Bench that this was a complete exchange of securities, and that trover would not lie for the three bills of exchange. It was also held that if the exchange had not been complete, still that the banker having become bankrupt, and the three bills having come to the possession of his assignees, must be considered as goods and chattels in the order and disposition of the bankrupt at the time of his bankruptcy.

In order to change the property in bills so deposited by a customer with his banker, a contract must be shown between the banker and customer, by which the property in the bills is to be changed, as, for instance, a contract by the bankers to buy or discount the bills. *Thompson v. Giles*, 2 B. & C. 428, 432. And a contract of this nature which cannot be considered as beneficial to the customer ought not to be presumed without strong evidence. *Ib.* 430. Where, for instance, bills are not entered as cash, but as bills, although the amount is carried by the banker into the cash column, it does not follow that the customer assented to their being considered as cash. It is only an undertaking

on the part of the banker to answer drafts in advance to the amount of the bills so entered. *Thompson v. Giles*, 2 B. & C. 422, 429. There a customer was in the habit of indorsing and paying into his bankers' hands bills not due, which, if approved, were immediately entered (as bills) to his credit, to the full amount, and he was then at liberty to draw for that amount by cheques on the bank. The customer was charged with interest upon all cash payments to him from the time when made, and upon all payments by bills from the time when they were due and paid: and had credit for interest upon cash paid into the bank from the time of the payment, and upon bills paid in from the time when the amount of them was received. The bankers paid away such bills to their customers as they thought fit. The bankers having become bankrupts, it was held by the Court of King's Bench that the customer might maintain trover against their assignees for bills paid in by him, and remaining in specie in their hands, the cash balance, independently of the bills, being in favour of the customer. "It has been argued for the defendants," said *Bayley, J.*, "that we must infer an agreement to have been made between the banker and his customer, that as soon as bills reached the hands of the former, the property should be changed. Undoubtedly, if there were any such bargain, the defendants would be entitled to our judgment; but if there be no such bargain, then the case of customer and banker resem-

bles that of principal and factor, and the bills remaining *in specie* in the banker's hands will, notwithstanding the bankruptcy, continue the property of the customer. . . . It appears that the bills were not entered as cash, but as bills, and although the amount was carried into the cash column, it does not follow that the customer assented to their being considered as cash." See also *Ex parte Armitstead*, 2 G. & J. 371.

The same principle was acted upon by Lord *Cottenham* in the important case of *Jombart v. Woollett*, 2 My. & Cr. 389: there a merchant abroad sent drafts from time to time to his London correspondent for acceptance under an authority for that purpose, and upon an understanding that the liabilities of the latter in respect of all such acceptances should be covered by means of bills payable in London to be remitted to him from time to time. It was held by Lord *Cottenham*, C., that under such an arrangement, the presumption was, until an agreement to the contrary was shown, that the London correspondent was not intended or entitled to treat the bills so remitted as cash, or to discount them before maturity; and therefore that two of such bills, which were existing *in specie* in his hands at the time of his bankruptcy, and were not then due, did not pass to his assignees, but were the property of the party who remitted them. "Unless," said his lordship, "there be a contract to the contrary, if a person, having an agent elsewhere, re-

mits to him, for a particular purpose, bills not due, and that purpose is not answered, and then the agent carries them to account, and becomes bankrupt, the property in bills is not altered, but remains in the party making the remittance. That of course may be regulated by usage, but *prima facie*, without special contract, the presumption is, that the bills are received by the agent for the purpose of indemnifying him against any eventual loss, and are not to be dealt with as his own, and immediately converted into cash." See also *Ex parte Smith*, Buck, 355; *Ex parte Pease*, 19 Ves. 25; 1 Rose, 232; *Ex parte Frere*, 1 Mont. & Mac. 263; *Ex parte Brown*, 3 Mont. & A. 471; 3 Deac. 91; *Ex parte Cotterill*, 3 Mont. & A. 376; 3 Deac. 12. And even where bills are entered as cash, the assent of the customer to their being so considered must be proved, and the onus of proving it lies upon the banker. *Ex parte Sergeant*, 1 Rose, 153; *Thompson v. Giles*, 2 B. & C. 430.

6. *The Power given to the Court over Goods and Chattels coming within the reputed Ownership Clause.*—The goods which at the time of the bankruptcy were in the possession, order, or disposition of the bankrupt, with the consent of the true owner, do not pass by the adjudication, and in order to enable the assignees of a bankrupt to deal with them, an order must be made by the Commissioner, directing the assignees to sell them. *Heslop v. Baker*, 6 Exch. 740; *Barrow v. Bell*, 5 Ell. & Bl. 540. The order

to sell may be made upon an *Ex parte* application by the assignees supported by *prima facie* evidence (*Ex parte Barlow*, 2 De G. M. & G. 921; *Ex parte Wood*, 4 De Gex, Mac. & G. 861; *Ex parte Young*, ib. 864; *Re Gwyer*, 6 W. R. (L. C.) 694); but it must be specifically directed to the particular goods which the assignees are thereby authorized to sell and dispose of, for it has been decided that a mere general order for the sale of all goods which were in the possession, order, or disposition of the bankrupt with the consent of the true owner, does not satisfy the requirements of the statute. *Quartermaine v. Bittleston*, 13 C. B. 183; for as *Jervie*, C. J., well observes there, p. 158, "inasmuch as the goods to be taken under the authority of the order are confessedly the goods of a third person, it is not unfair that there should be some preliminary inquiry before the Commissioner, and something like a *prima facie* case made out, before the true owner is to be called upon to litigate his rights."

An order under the 125th section of 12 & 13 Vict. c. 106, is sufficient, if it specifies the goods ordered to be sold, without referring by name to the persons supposed to be the true owners of such goods. *Freshney v. Carrick*, 1 Hurlst. & N. 653.

The order for sale, when made, relates back to the act of bankruptcy, so that no subsequent act, either of the bankrupt or reputed owner, can defeat the title of the assignees. See *Heslop v. Baker*,

6 Exch. 740; 8 Exch. 411. In *Ex parte Heslop*, 1 De G. M. & G. 477, a mortgagee of goods under a bill of sale allowed the goods to remain in the order and disposition of the mortgagor, until the latter committed an act of bankruptcy, but took possession before any petition of adjudication was filed. On the mortgagor being found bankrupt, the messenger took the goods out of the mortgagee's possession, and sold them. The mortgagee brought an action of trover and recovered, on the ground that under the Bankrupt Law Consolidation Act, 1849, the assignees could not sell, without an express order of the Commissioner, goods in the reputed ownership of a bankrupt. The assignees applied to the Commissioner, who made an order *retrospectively* confirming the sale, and reciting, as a fact, that the goods were in the order and disposition of the bankrupt at the time of the bankruptcy, with the consent of the true owner. It was held by the Lords Justices of the Court of Appeal in Chancery, that the mortgagee was not entitled to have the order discharged on his appeal, as being invalid upon the face of it; and on the appellant declining to enter into the question whether he had notice of the act of bankruptcy, when he took possession, his appeal was dismissed with costs.

The order for sale however, as it may be made upon an *ex parte* application, is not final and binding upon the true owner, who had no opportunity of being heard against

it; he may still try the question of reputed ownership at law, through the intervention of a jury. *Graham v. Furber*, 14 C. B. 134.

The effect of the law of reputed ownership is not a forfeiture of the property. In *Bryson v. Wylie* (1 Bos. & P. 83 n.), "Bryson was a creditor of the bankrupt for so much, and his taking that species

of security did not avoid his demand for the debt. If a man were to purchase goods and pay for them, and permitted them to remain in the hands of the seller, who became bankrupt, he would be a creditor to the amount of the money he paid for the purchase." Per Lord *Redesdale*, in *Joy v. Campbell*, 1 S. & L. 337; *ante*, p. 399.

SIR EDWARD WORSELEY ET AL., ASSIGNEES OF
RICHARD SLADER, A BANKRUPT, v. DE MATTOS AND
SLADER.

Court of King's Bench, Hil. Term, 31 Geo. II. Feb. 7, 1758.

[REPORTED 1 BURR. 467 ; S.C. 2 LD. KENN. 218.]

BANKRUPTCY—FRAUDULENT PREFERENCE.] — *A trader by deed transferred and assigned all his estate and interest in certain premises, and also all his stock used and employed in the several trades he carried on, and all his changeable stock, debts, etc., to a banker, in order to secure to him the repayment of money he should advance; at the same time continuing himself in possession of everything conveyed by the deed, and having nothing of value but what was comprised therein. Held, that the trader, by this transfer of all his property, though by way of security and for valuable consideration, had committed an act of bankruptcy.*

The present question came before this Court, after a trial at law before Lord Mansfield, C. J., upon a feigned issue out of the Court of Chancery, to try whether one Richard Slader, a trader, was a bankrupt; and, secondly, if he was a bankrupt, then upon what particular day he became so; and that particular day on which he should be found to have become a bankrupt, was to be indorsed upon the *postea*.

It was soon agreed as to the first point, "That he certainly *did* become a bankrupt" by an undoubted clear act of bankruptcy, committed on the 13th of November, 1756. But upon the second point, as to *the time when* he *first* became a bankrupt, it was insisted on behalf of the plaintiffs, that he became a bankrupt anterior to that 13th of November, viz. upon the 23rd of October; namely, by the very executing the deed in question which bore the latter date, for they alleged this deed to be *fraudulent*, and the

executing it to be *ipso facto* an act of bankruptcy within the statute of 1 Jac. I. c. 15, s. 2, which statute expressly makes any fraudulent grant or conveyance of the trader's lands or goods, whereby his creditors may be defeated or delayed of their just debts, a specific act of bankruptcy.

If the deed was fraudulent, within the true intent and meaning of the statute, he certainly committed an act of bankruptcy on the 23rd of October. If it was not, he did not commit any act of bankruptcy till the 13th of November.

The jury found him a bankrupt; and by consent the following order was made at *nisi prius*, viz. that either party be at liberty to move the Court. And if the Court shall, upon such motion, be of opinion "that the deed of the 23rd of October, 1756, is under all the circumstances *fraudulent*, and the execution of it by Richard Slader an act of bankruptcy," then the *postea* shall be marked on the back thereof, "That the said Richard Slader became a bankrupt on the said 23rd of October, 1756;" but if the said Court should be of opinion that the execution of the said deed, under all the circumstances, by the said Richard Slader be *not* an act of bankruptcy, then the said *postea* shall be marked on the back, "That the said Richard Slader became a bankrupt on the 13th day of November."

The form of the rule under which it came before the Court was thus:—"It is ordered that the plaintiffs show cause why the *postea* in this cause should not be indorsed, 'That Richard Slader became a bankrupt on the 13th day of November, 1756.'"

Lord *Mansfield*, C. J., first repeated the whole evidence very particularly and minutely, which, after the counsel had done, was resolved, by the opinion of the whole Court, into the following case, viz. :—

James Davis, an agent of Isaac de Mattos, knowing Slader to be indebted, and that he could not carry on his trade unless somebody in London, in the nature of a banker, would pay his draughts, negotiated, in the month of July, 1756, an agreement between the said Isaac de Mattos and Richard Slader, "that De Mattos should pay Slader's draughts, upon having security."

The nature of the security, and the terms of agreement, appear only by the deed of the 23rd of October prepared, and procured to be executed by James Davis and James Whitehead, both of them agents of Isaac de Mattos.

The deed in question bears date the 23rd of October, 1756; and

recites Slader's title to the mill and premises, and also his being concerned in and carrying on divers branches of merchandise, and other business; and his having frequent occasion to draw and remit sums of money from and to London; and his having requested Isaac de Mattos to be his agent or banker there; and that in order to indemnify him for so doing, Slader had agreed to transfer and assign all his estate and interest in the premises aforementioned in the said indentures, and also all his stock used and employed in the trades of brewing and making malt, and in the business of a corn-factor and miller, to the said Isaac de Mattos, his executors, administrators, and assigns for that purpose; and then the deed imports that for the purposes aforesaid, and in part of performance of the said agreement, and in consideration of five shillings, he the said Slader grants, assigns, etc., his said messuage, corn water-mill, and divers other things (subject to a mortgage then subsisting, on part thereof). And further, in full performance of the said agreement, and for the consideration aforesaid, he grants, etc. all his stock, utensils, and other things used in his trades of brewing and malting and of a corn-factor and miller, consisting of coppers, tuns, backs, coolers, pumps, cisterns, screens, and other implements; and also all his changeable stock, consisting of debts, horses, carts, casks, hops, beer, ale, wheat, barley, malt, coals, wood, and all other goods and commodities belonging, employed, or made use of *in the said several trades* or any of them; and all his estate, right, title, interest, property, claim, and demand whatsoever thereto and to every or any part thereof to the said Isaac de Mattos, his executors, etc., defeasanced however on his the said Slader's paying and making good to the said Isaac de Mattos, all the sums of money which he should advance and pay on any note, draught, bill, or other writing of the said Slader; and on his indemnifying De Mattos against the same, and all matters any ways touching or concerning the said agency. This deed further contains the common covenants; and there is a receipt indorsed for the five shillings consideration money. In it is also a covenant that in case of breach of or failure in the conditions, etc., or any part thereof, *then and from thenceforth* it should be lawful for the said Isaac de Mattos, his executors, etc., to *enter, possess, and enjoy* the said land and premises, etc., and also *to take to his and their own use*, and uses absolutely, all and singular the premises last before-mentioned, viz. the stock, etc.

Upon the 8th of October, Richard Slader drew a bill upon Isaac

de Mattos, by authority from him for £200. But to give it credit it was made payable to the said James Davis, and indorsed by him.

Upon the 23rd of October, Richard Slader drew another bill upon Isaac de Mattos, by authority from him: but to give it credit, it was made payable to the said James Whitehead, and indorsed by him.

Isaac de Mattos himself personally knew that the affairs of Richard Slader were in confusion, and hired Samuel Sills, whom he sent down in the month of October, to be book-keeper to this Richard Slader. Sills accordingly went, and had examined all Slader's accounts and affairs by the 20th of October.

The deed (which had been a considerable time in preparing) was executed on the 23rd of October, and it is witnessed by the said James Whitehead, James Davis, and Samuel Sills.

The bankrupt continued in possession of everything conveyed by the said deed, and James Davis took occasion to tell the creditors of Richard Slader "that the said Slader would do very well," that "he had recommended him to two good men," and that "Slader had given a mortgage of the mill, and other leasehold premises;" but James Davis concealed, and did not mention Slader's having assigned his general effects.

Upon the 11th of November, Slader told Davis and Sills, both together, "*that he could not stand,*" and consulted them what to do. The result of which consultation was—that Sills, by order of Slader, the same day gave possession to Davis, as agent of De Mattos, who immediately set out for London. The next day (the 12th of November) Slader ordered Sills to deny him. On the 13th Sills did deny him accordingly, and told the reason "that it was to commit an act of bankruptcy."

Slader had nothing of value *but* what was comprised in the deed of the 23rd of October, and he traded as a brewer, maltster, corn factor, and miller, but carried on no other trade.

After the 13th of November, Isaac de Mattos paid the said two draughts indorsed by Davis and Whitehead.

Serjt. *Prime*, Mr. *Gould*, Serjt. *Davy*, for the plaintiffs (after Lord *Mansfield* had reported the evidence), proceeded to show cause. And they urged the deed to be merely colourable, and so fraudulent as to constitute in itself an act of bankruptcy, being to the intent to *defeat and delay* his creditors, or whereby they might be defeated or delayed.

They cited *Twyne's* case (3 Co. 80), and the rules and resolutions contained in it, and urged that the present case was fully within it. They also cited 13 Eliz. c. 7, and 1 Jac. I. c. 15, s. 2, which goes further than 13 Eliz.; likewise 2 Inst. 110, on the statute of Marlebridge; *Curson's* case, 6 Co. 76, S.P.; *Lord Pagett's* case (Moore, 193), upon the statute of fugitives beyond seas made anno 13 Eliz. (in which they observed that 13 Eliz. c. 3, is in Rastal and not elsewhere); *Tucker v. Cosh* (Style, 288); *Small v. Oudley et al.* (2 P. Wms. 427), where a goldsmith assigned *two-thirds* of his stock in the wine trade, and it was holden good, but *contrà* if it had been of *all* his goods, etc. Also *Dr. Goodfellow's* case, Lucas Rep. 489 (S. C. nom. *Cock v. Goodfellow*, 10 Mod. 489), and *Ryall v. Rowles*, in Canc. 27 Jan. 1749 (1 Ves. 348; 1 Atk. 165). And they observed that here there was no possession altered; no estimate or account taken of the stock, etc., nor any consideration paid.

Mr. Norton, and Mr. Morton, for the defendants insisted, that even if it was granted that this deed was fraudulent, as against creditors or purchasers, yet it would not be an act of bankruptcy, for the Act has a proviso to except deeds made *bonâ fide* and upon good consideration (see 13 Eliz. c. 7, § ult.). This deed was made *bonâ fide* and upon good consideration. It was made by Mr. Slader, a trader in the country, to secure Mr. De Mattos, who agreed to become his banker or agent in London; and to permit Slader from the country to draw upon him in town; and the only intent of it was to indemnify De Mattos against Slader's over-drawing. *Unwin v. Oliver*, in Canc. Tr. 12 Geo. II., was a like case determined by the Lord Chancellor. And this transaction tended to enable the country trader the better to carry on his trade, and was far from being intended to deceive his creditors.

It must be agreed, that this deed of assignment includes goods and utensils, as well as the house and mill, etc., and that there was no previous appraisement. But that was quite unnecessary, because it could not be then known how much money was to be secured.

As to *the owner's continuing in possession*.—The case of *Meggott v. Mills*, 1 Ld. Raym. 286, B. R. 1697, was so, and yet not fraudulent. *Bucknal v. Roiston*, Prec. Ch. 285, was the like. And in the nature of the thing, possession could not be delivered in the present case, because the debt to be secured was future and uncertain. So that this continuing in possession was no *mala fides*—no badge or evidence of fraud, because it did not give the owner a false and

fallacious credit. Neither was it secret, but notorious, and it was not with intent to defeat and delay his creditors, but to their benefit, and calculated to support Slader's credit, and to enable him to pay his creditors

The *generality* of a deed is not always and necessarily an evidence of fraud; for unless there be a trust, either expressed or implied, there is no fraud; and here is no trust, either expressed or implied, nor could De Mattos recover more than was fairly owing to him.

The case of *Ryall v. Rowles* was rightly determined, "that a security may be lost, by suffering a continuance in possession;" but it does not follow that our continuance in possession constituted an act of bankruptcy. Here was neither imposition nor collusion. It is only a mortgage of his personal property, and for a fair consideration.

To prove it not to be an act of bankruptcy, they cited several cases. In the case of *De Gols v. Ward*, in 1739, the *quo animo* was indeed clear and plain. The next case where a deed was considered as an act of bankruptcy, was *Ashley's* case, but that was also quite clear. So again in *Mackrell's* case, lately, where it was indeed given up. But there is nothing intentionally ill in the present case.

If this mere giving security to indemnify his banker was an act of bankruptcy, it could never afterwards be purged, which would be a great inconvenience to trade, because it is a common case. And this man gave it to his former banker as well as to De Mattos.

It is no act of bankruptcy, unless the deed be fraudulent, as well as intended to give unjust preference to one creditor before another. And there is no pretence in the present case that any bad use has been made of this deed.

The 5th clause of 1 Jac. I. c. 15 would be nugatory, if the 2nd was to be understood to make the executing such a deed as this an *ipso facto* act of bankruptcy. It was only a contingent and collateral security, depending upon future events and circumstances, and therefore there could not, in the nature of the thing, be either delivery of immediate possession or any particular consideration money expressed. And De Mattos's being liable to be damned was of itself alone a good consideration.

The case of *Unwin v. Oliver*, P. 12 Geo. II. in Canc., was this:—Unwin being appointed receiver by the Court, and thereupon obliged to give security, assigns his debts as a security (amongst other things) to the persons who were bound for him in a recognizance

upon that occasion. And afterwards he became bankrupt. This assignment of his debts was holden good.

Bankruptcy is considered by the Acts of Parliament as a crime;¹ the description of an act of bankruptcy, or of persons becoming bankrupt, must be therefore taken strictly. And the acts that constitute bankruptcy must be done with intent to defraud or delay creditors. Put the case of an officer in the revenue appointing a trader his deputy, and for his indemnity taking from such deputy such a deed as this is; would the executing it make the trader a bankrupt?

The act 21 Jac. I. c. 19, ss. 10, 11, takes care of any inconvenience to the creditors arising from the trader's continuing in possession. But such assignments have never been considered as constituting an act of bankruptcy. *Small v. Oudley*, 2 P. Wms. 427; *Jacob v. Shepherd*, there cited; *Ryall v. Rowles*, in Canc. 27 Jan. 1749, which was an assignment by Harvest the bankrupt, of *all* his goods, utensils, etc., and was made liable to *future* moneys to be advanced.

The plaintiff's counsel, in reply, urged the inconvenience that must arise to trade from such general assignments of *all* a trader's effects in trade, unvalued and unappraised, in order to secure eventual debts, not existing at the time of executing the deed, and insisted that 1 Jac. I. c. 15, s. 2, expressly makes such conveyances acts of bankruptcy.

Here is no consideration of any money paid, or any debt really contracted, nor was any money afterwards advanced upon this deed. And for what was then owing to Mr. De Mattos, he had at that time a warrant of attorney to confess and enter up a judgment. Though it was afterwards destroyed, when he actually took possession under the deed now in question. And indeed if there had been a real debt subsisting, yet this had been an undue preference within the Act. But as it was not so, nor anything done in consequence of this deed, it is merely fraudulent; none of the cases, on either side, are in point. In *Unwin's* case, there was a consideration, for an indemnity is a good consideration. And the case goes no further than to prove "that it is so."

But of movable chattels possession ought to be instantly and actually given, and of immovable or remote chattels possession of every title to it and everything that can in the nature of the thing be done towards it. Whereas here was no attempt to take possession till the man was determinately going to become bankrupt, by

¹ "Whatever may have been thought in former times, an act of bankruptcy is not now a crime." Per *Parke, J.*, in *Cumming v. Baily*, 6 Bing. 374.

• a plain, indisputable act, on the 11th of November. Therefore this general provision for *one* particular creditor implied a secret trust or conciliating favour, which is a badge of fraud and collusion. And no argument can be drawn from mortgages of land (where it is the usual method for the mortgagor to remain in possession) to the keeping possession of goods assigned over. And if this had been an honest transaction, there would have been an appraisement and a schedule, and it would not have been left thus at large.

As to its not being to be afterwards purged. That does not alter the case at all, for no act of bankruptcy can be purged but by obtaining a certificate.

As to 21 Jac. I. c. 19, s. 11, continuing in possession was always looked upon as an evidence of fraud. That law is only declarative of what was the law before. The cases cited of *Ward*, *Ashley*, and *Mackrell*, prove nothing against us at all.

Lord MANSFIELD, C. J., said the Court would consider it, both upon the particular circumstances and upon the general principles, and it would be proper to consider the subject with regard to traders in general under 13 Eliz. c. 7, as well as to traders becoming bankrupts. And they would give notice when they were ready to declare their opinion.

Lord MANSFIELD, C. J., now delivered the opinion of the Court. The question is, whether upon all the above circumstances, Slader became a bankrupt on the 23rd of October, or on the 13th of November, and the *postea* is to be indorsed as to the time of Slader's becoming bankrupt according to the opinion of the Court.

All the Acts concerning bankrupts are to be taken together, as making one system of law. They are all to be construed favourably for creditors and to suppress fraud. Whether a transaction be fair or fraudulent, is often a question of law. It is the judgment of law upon facts and intents.

The indemnity, which is the consideration of the deed in question, I allow to be a good, valuable, and true consideration, and I allow this deed to be a valid transaction, *as between the parties*. But valid transactions, as between the parties, may be fraudulent by reason of covin, collusion, or confederacy, to injure a third person. For instance, A. buys an estate from B. and forgets to register his purchase deeds. If C., with express or implied notice of this, buys the estate for a full price, and gets his deeds regis-

tered, this is fraudulent, because he assists B. to injure A. (see *Le Neve v. Le Neve*, 2 Lead. Cas. Eq. 23), or if a man, knowing that a creditor has obtained a judgment against his debtor, buys the debtor's goods for a full price, to enable him to defeat the creditor's execution, it is fraudulent. Again, if a man, knowing that an executor is wasting and turning the testator's estate into money, the more easily to run away with it, buys from the executor *with that view*, though for a full price, it is fraudulent.

Marriage, brocage bonds, secret agreements different from the open treaty of marriage, and many other cases that might be put, though for true and valuable consideration as between the parties, are fraudulent by reason of deceit or injury consequentially brought upon third persons. *Twyne's case* (3 Co. 80 b. 81 a.), even in a criminal prosecution, was of this sort. The consideration of the sale was more than sufficient and undoubtedly true.

Whether this deed be of that sort, will depend upon the whole purpose of it. As to *all* (except the leasehold), it could not have the effect of a conveyance, if De Mattos permitted Slader to continue in possession.

By the express tenor of the deed, Slader was to have the absolute order and disposition as before. In fact, he was permitted to continue in possession, and act as owner. They who dealt with him, trusted to his visible trade and stock. They trusted to the bankrupt-law that he could neither have sold or mortgaged, and in case of a misfortune, that his effects might be equally distributed. They were imposed upon by false appearances. To deceive the more under a fictitious show of credit, the bills drawn upon De Mattos were made payable to and indorsed by his own agents. Davis, one of his agents, expressly told the creditors, "That Slader would do very well; that two good men, upon security of the leasehold, would pay his draughts," but concealed that he had mortgaged anything else.

A false show by collusion to deceive third persons is generally connected with a secret confidence. So here, the trust put in Slader manifestly was, that when he could stand no longer, he should give notice to De Mattos or his agents to deliver possession, and then commit a positive act of bankruptcy. From the nature of the fund, possession never could be meant to be taken, but as the immediate forerunner of a commission in bankruptcy. He could not stand a moment after his whole trade, fixed and fluctuating stock, and credits, were taken from him. To watch Slader, De

Mattos put Sills about him as his book-keeper. Agreeably to the confidence put in him, when Slader saw he could stand no longer, he acquainted Sills and Davis, the agents of De Mattos, with it, and by their advice first gave an order to deliver possession, and then to be denied. This shows to a demonstration, that they were all aware that possession was necessary and intended from the first, by a formal delivery of possession, when he was determined to break, to evade the clause (s. 11) in 21 Jac. I. c. 19, for the measure was instantly taken without any new advice.

I will consider this transaction more particularly in two great views. 1. In respect to the end. 2. In respect of the means.

As to the first.—The end proposed by the secret trust was, that in case Slader should become bankrupt, his whole estate should first be vested in De Mattos, for payment of what was justly due to him. The *preference* aimed at was *fraudulent and unlawful*. Suppose *after* the consultation on the 11th of November this deed had been prepared and executed, accompanied with such formal delivery of possession, we are of opinion that it would have been fraudulent and an act of bankruptcy.

Such preference is a fraud upon the whole bankrupt law and would defeat the two main objects it has in view, to wit, the *management* of the bankrupt's estate, and an *equal distribution* among his creditors.

The law gives the management to persons chosen by the creditors, under the direction of commissioners and the control of the great seal. But if a bankrupt may convey all to a favourite and friendly creditor, just before he orders himself to be denied, the whole power of selling his effects, calling in his debts, and settling his accounts must be in such single and particular creditor,—he must have a right even to the custody of the books and papers.

An equal distribution among creditors, who equally gave a general personal credit to the bankrupt, is anxiously provided for, ever since the act of 21 Jac. I. c. 19. (See ss. 9, 10, 11.) It was thought mischievous to suffer priorities to be gained by secret liens, as by judgment, statute, recognizance, bond, specialties, attachments by custom in London or elsewhere, assignment of debt to the king's debtor. Unless they took out execution, these all equally gave a personal credit to the bankrupt, and trusted him to manage his effects.

Conveyances of *personal chattels* by way of security, where possession was left with the bankrupt, fell within the same reason.

Land is held without perception of the profits by the *title*. But there is no hold of goods, which the mortgagor is allowed to possess and dispose of. Therefore by a clause in the same act (s. 11) any priority by such secret lien is also taken away; and, as such mortgagee equally gives a general credit, he is levelled with the other creditors. But if a bankrupt may, just before he orders himself to be denied, convey *all* to pay the debts of favourites, the worst and most dangerous priority would prevail, depending merely upon the unjust or corrupt partiality of the bankrupt.

A case lately happened (*Ex parte Foord and others, re Gayner*, a bankrupt, 31st July, 1755), where a conveyance calculated to postpone one creditor to the rest, was held an act of bankruptcy. It came on before Lord *Hardwicke*, the late Lord Chancellor, at Lincoln's Inn Hall. One Gayner, a trader, had made an assignment on the 7th of June, 1755, of all his effects, goods, stock in trade, and book debts (except household goods, watches, plate, bills of exchange, inland bills, promissory notes, and cash, then by him) to trustees, in trust to pay themselves and all the rest of his creditors *except* Foord, the petitioner. But the trustees declining to act under this assignment, he executed another on the 9th of June, 1755, wherein the trustees were to pay themselves and all the creditors mentioned in a schedule (in which schedule the petitioner was not included), and in this second assignment a large parcel of ginger as well as the things above mentioned were excepted. The petitioner insisted that he alone could choose assignees, since the other creditors claimed under the assignment. Lord *Hardwicke*, C., was clear, that the executing the deed of the 9th of June was an act of bankruptcy. And all that had heard his determination were of the same opinion. And everybody concerned acquiesced in it, whereupon the creditors mentioned in the schedule consented to waive all benefit or advantage under that assignment, and all proved their debts, in order to receive an equal dividend with the petitioner, and the creditors proceeded to a choice of new assignees.

The framers of this deed executed by Gayner, took for granted that if it had been a conveyance of *all* his effects, it must be bad, and therefore *colourably excepted parts*. But the contrivance did not prevail, even so far as to bear an argument, or to be thought by anybody worthy of a trial.

There is a great difference between the conveyance of *all*, and of a *part*. A conveyance for part may be public, fair, and honest. As a trader may sell, so he may openly transfer many kinds of pro-

perty by way of security. But a conveyance of *all*, *must either be fraudulently kept secret or produce an immediate absolute bankruptcy.*

It has been argued, that after a resolution taken by a trader to commit an act of bankruptcy, the trader so resolving to become bankrupt might lawfully prefer a just creditor, by conveying part of his effects to satisfy that creditor's debt. It is not necessary to determine that question in this cause, for here the conveyance is of *all*, and therefore I will say that no such proposition is yet established, much less to the extent whereto it has been urged. (See *Harman v. Fishar*, *post*, p. 455.) The cases mentioned were *Cock v. Goodfellow* (10 Mod. 489), *Jacob v. Shepherd* (2 P. Wms. 430, 431, cited), *Small v. Oudley* (2 P. Wms. 427), and *Unwin v. Oliver*.

In the case of *Cock v. Goodfellow*, the fact did not give rise to any question. An immediate prospect of a certain bankruptcy was not the motive to what Mrs. Cock did. She was solvent at the time, and that very day lent £40,000. Besides, her children, to whom she was guardian and trustee, were not upon the foot of common creditors. The Court of Chancery would have decreed her to place their fortunes out upon Government or real securities.

As to the case of *Jacob v. Shepherd*, I have looked into the Register's book upon this occasion, and I have a note of it, as stated by Lord *Hardwicke* in the cause of *Bourne v. Dodson* (1 Atk. 154), and it was this Mr. Thomas Leigh, the bankrupt, who was a Turkey merchant, by deed, dated the 8th of June, 1709, sold and conveyed *particular goods* in the hands of his factors to Mr. William Snelling, upon trust to apply the money arising thereby in satisfaction, in the first place, of a debt of £1500 due to Snelling himself, and then of a debt of £1551 and interest due to George Morley, and out of the residue to pay such of the bankrupt's creditors as he, with Morley's consent, should direct. And if there should be any surplus after the said Snelling's and Morley's debts were paid, and sums for which they were bail, or security for the said bankrupt, the same was to be paid to the said bankrupt, his executors, administrators, and assigns. Afterwards, by deed dated 16th December, 1709, and by deed dated 20th January, 1709, other debts were appointed to be paid, agreeably to the power reserved by the former deed. On the 11th of February, 1709, Thomas Leigh failed, and committed an acknowledged act of bankruptcy, and a commission was taken out, and his

estate and effects assigned. The trusts of the deed of the 8th of June, 1709, were immediately and openly carried into execution, so that no question ever did or could arise upon the clause of 21 Jac. I. c. 19 (s. 11). But the assignees brought a bill against all the parties claiming under the deed of the 8th of June, 1709, and the subsequent deeds, to have them set aside, and to have an account of the money which they had received, upon two grounds, 1st. That the deeds were obtained by fraud and imposition on Leigh the bankrupt. 2ndly. That they were an imposition upon the other creditors. The cause came on to be heard at the Rolls, upon the 16th of June, 1725. Sir *Joseph Jekyll* took time to consider of it, and ordered all the pleadings and proofs to be left with him; and upon the 17th of December, Sir *Joseph* gave judgment. He thought these deeds could not be looked upon or set aside upon the former ground, viz. as a fraud upon the bankrupt; but he declared the said deeds to be fraudulent, and an imposition upon the *creditors* of the bankrupt, and decreed them to be set aside with costs.

In making this decree he went upon right principles, but did not attend to its being a bankruptcy, if it was really fraudulent, and that a Court of Equity could not decree it to be fraudulent unless it was fraudulent at law, in which case it would constitute an act of bankruptcy of itself.

On the 6th of August, 1726, Lord *King*, C., upon appeal, directed an issue at law to try "whether, by the execution of the deed of the 8th of June, 1709, Thomas Leigh became a bankrupt, or at any other and what time." The jury found he became a bankrupt on the 11th of February, 1709. Upon the equity reserved Lord *King* established the deeds, held the plaintiffs to be only entitled to the surplus after the trusts in the deeds were performed, and decreed the proper accounts against the defendants, of the money they had received, in order to find out that surplus. Many very obvious observations occur upon this case. Sir *Joseph Jekyll* was so struck with the objections of fraud from preference, that he set aside the deeds, with costs. Lord *King* reversed his decree, because no deed made by a trader can be fraudulent in Chancery which is not fraudulent in a Court of Law and an act of bankruptcy. Therefore he directed an issue.

There might be many reasons why it was not found fraudulent upon the trial. The deed was executed the 8th of June, of *specific* goods, and was immediately carried into execution. The act of bankruptcy was not till the 11th of February following, and I see

no suggestion that in June Leigh thought of committing an act of bankruptcy. Besides, one ground upon which the assignee brought his bill was fraud and imposition upon the bankrupt himself in obtaining the deeds; therefore, most probably, he was frightened into giving this security by threats of legal diligence against him.

The case of *Small v. Oudley* was determined very soon after, viz. upon the 4th of December, 1727; the best report of it is in 2 P. Wms. 427, but is nowhere fully stated. I have a copy of the decree from the Register's book, as follows:—On the 21st of September, 1720, Small, to accommodate Daniel and Joseph Nercott Brothers, goldsmiths, and partners upon a pressing occasion, transferred to them £500 S. S. stock, upon their engaging to transfer to him the like sum in the S. S. stock in a week or ten days at furthest, and giving a note for that purpose. They sold the S. S. stock for £1800. On the 29th of September, 1720, they made the assignment of their share in a wine partnership with Oudley, carried on solely in his name (in which they had two-thirds and Oudley one-third), as a security for transferring £500 S. S. stock, and reciting the truth of the case. They at the same time assigned two leasehold estates to Small for the same purpose. Their interest in the wine trade was but £300, and Oudley had a right to carry on the trade till Christmas, 1723. The bill, which was against Oudley and against the assignee, under a commission issued against the Nercotts, was not brought by Small till after that time, but an issue had been directed in another cause to try “whether the said Nercotts were bankrupts at the time they executed an assignment to Small of a lease of certain houses, on the said 29th of September, 1720.” The above facts are admitted by the answers, no fraud is suggested, and they do not mention any desire to have the time of the bankruptcy tried over again. Sir *Joseph Jekyll*, in 2 P. Wms. (pp. 429–431), gives strong reasons against the decree he thought he was bound to make, because Lord *King* had just established that a deed by a bankrupt could not be set aside as fraudulent in Chancery. This case too was very particular. The fraud was upon Small, and not upon the creditors. His stock was to be replaced, in a week or ten days at furthest, by the original agreement. £1800 of Small's money went to the creditors, and this security amounted but to about £300. So that the whole transaction was beneficial to the bankrupt's creditors. The S. S. stock was got from Small, with a view to save the Nercotts from breaking. The security was given at the very time they were obliged to replace the £500 S. S. stock, and there

was no pretence that Small afterwards permitted them to continue one moment in possession.

The case of *Unwin v. Oliver*, T. 12. Geo. II., is not entered in the Register's book, but I have seen a fuller note of it than was cited at the bar. It was an assignment of several debts mentioned in a schedule, to indemnify his securities in a recognizance. Martin Unwin had been appointed receiver of a lunatic's estate, and the plaintiffs became his securities, by recognizance "that he should account for what he should receive under the orders of the Court." Two years after Martin Unwin, by deed reciting "that £604 was due from him to the lunatic's estate," assigned to the plaintiffs several debts, mentioned in a schedule annexed to the assignment, to discharge the £604, and to indemnify them against this security which they had entered into for him. A month after this assignment, Martin Unwin became a bankrupt. The act of bankruptcy was admitted to be a month after the assignment. No question was made upon the clause 21 Jac. I. c. 19; and there was no suggestion that the immediate prospect of a certain bankruptcy was the cause of the assignment. Lord *Hardwicke* held that it could not be set aside as fraudulent in Chancery unless it was fraudulent in a Court of Law and an act of bankruptcy, and he held that indemnity was a good consideration, of which there can be no doubt.

But *secondly*, to consider this transaction in respect of the means. Suppose a bankrupt could, after a resolution to commit an act of bankruptcy, prefer *one* of his creditors, by an assignment of *all* (which we think he cannot), yet in this case, the *means* to attain such preference were fraudulent. A false credit is industriously given the bankrupt upon a secret trust to deliver possession so as to avoid the clause in the 21 Jac. I. c. 19.

The second argument of fraud in *Twyne's* case (3 Co. 81) is, "the donor continued in possession, and used them as his own; and by means thereof traded with others, and deceived and defrauded them."

But three cases have been cited to show, that upon a mortgage of goods by a trader, the leaving possession does not infer fraud, though it may upon an absolute sale. These are the cases of *Meggott v. Mills* (1 Ld. Raym. 286), *Bucknal v. Roiston* (Prec. Ch. 285), *Ryall v. Rowles* (1 Ves. 348; 1 Atk. 165), in Chancery, 27th of January, 1749. The first is a direct authority to the contrary, for Lord Chief Justice *Holt* says, "If these goods of Wilson's had

been assigned to any other creditor, the keeping of the possession of them had made the bill of sale fraudulent as to the other creditors." But he very justly distinguished that case, and seems to have considered the landlord (who lent his tenant money to buy the goods to furnish his house) as the original owner of the goods.

Bucknal v. Roiston was not a case of bankruptcy, but upon the course of administration of assets where secret liens give priority, and it is expressly distinguished by my Lord Chancellor from the case of a bankrupt. Besides, the possession was there a trust under an authority to negotiate and sell, and could not be meant to give any false credit. In the case of *Ryall v. Rowles*, the act of bankruptcy upon which the commission proceeded was long after the mortgages; the assignees did not wish to carry it further back, and therefore never objected, that the bankrupt's keeping possession made the mortgages fraudulent; but if they had, in that case the presumption of fraud would have been disproved. The same fund was mortgaged six times over. They all trusted to their conveyances (like mortgages of land) as a title without possession, though a bankruptcy should happen. They mistook the law, but did not evade it.

Whereas here the parties manifestly were aware that possession was necessary. The solemn determination in the case of *Ryall v. Rowles* had made that point notorious. Possession was here left, upon a secret trust to deliver it so as to avoid the clause in 21 Jac. I. c. 19, which in fact was accordingly done.

Two general *objections* from inconvenience have been urged which deserve an answer. 1st. That it will hurt credit, if traders may not raise money by mortgaging their goods without quitting possession.

The answer to this is, the policy of the bankrupt law introduced by 21 Jac. I. c. 19, and followed ever since, is to level all creditors who have not actually recovered satisfaction, or got hold of a pledge which the bankrupt could not defeat. A trader is trusted upon his character, and visible commerce. That credit enables him to acquire wealth. If by secret liens a few might swallow up all, it would greatly damp that credit.

If he mortgages and parts with possession of goods, the world has notice; but to give priority from mortgaging goods, of which the trader is allowed to act and appear as the owner, would be enabling him to impose upon mankind and draw them in by false appearances. No injustice is done to such mortgagee, because he

really trusts only to the general credit of the trader. The conveyance is not a fraud against him, but against his other creditors. Mortgages of land are checked by the title. But where possession is not delivered, goods may be mortgaged a hundred times over, and open a plentiful source of deceit.

The other general *objection* from inconvenience was, that a fraudulent deed is an act of bankruptcy upon the face of it, and can never be purged. I am sorry the phrase has crept into use, because it confounds the idea which ought to be annexed to it. Every equivocal fact may be explained by circumstances. If a trader orders himself to be denied, circumstances may show that he did not do it to avoid payment, but on account of sickness or particular business. So if he leaves his house, circumstances may show it was not to abscond.

Of all the equivocal facts which can amount to acts of bankruptcy, deeds are most open to be explained by a variety of circumstances. Hardly any deed is fraudulent upon the mere face of it. It is a good sale if the consideration be true; fraudulent, if false; good, if possession immediately follows; bad, if it do not; nay, the not taking possession being only evidence of fraud may be explained.

The use to which a deed is applied, shows *quo animo* it was made. Leaving possession till after the act of bankruptcy, in the case of *Ryall v. Rowles*, showed there was no fraud, and that they trusted to the conveyance.

In this case, the consultation and delivery of possession upon the 11th of November proves the secret trust, in confidence of which the false credit was given the bankrupt before. It shows that evading the clause in 21 Jac. I. c. 19, was in the view and contemplation of the parties. There was no other reason for delivering possession on the 11th of November, because no default had happened, which gave De Mattos more pretence to enter then than before.

Under all the circumstances, we are of opinion that this conveyance of the bankrupt's *whole* substance to De Mattos, though by way of security and for valuable consideration, is fraudulent and an act of bankruptcy. The determination here is upon the assignment of *all*.

PER CUR. : The *postea* must be indorsed, "That Richard Slader became bankrupt on the 23rd of October."

HARMAN AND OTHERS, ASSIGNEES OF
FORDYCE, v. FISHAR.

Trin. Term, 14 Geo. III. June 18, April 29.

[REPORTED COWP. 117.]

BANKRUPTCY—FRAUDULENT PREFERENCE.]—*A trader, in contemplation of absconding, encloses certain bills to F., a particular creditor, in discharge of his debt; saying he has the honour to show him that preference which he conceives is his due. This is done without the privity of F., and followed by an act of bankruptcy before the notes could possibly be delivered. Per Cur.: The essential motive being to give a preference, and the act itself incomplete, is clearly void though in favour of a very meritorious creditor.*

Legal preference is where property is duly and regularly transferred, and the transfer itself is complete before an act of bankruptcy. As where payment is made by a trader in the ordinary course of dealing, or enforced by legal process, though but the evening before he becomes bankrupt.

This was an action of trover, brought by the assignees of Fordyce against the defendant, to recover two promissory notes. At the trial a verdict was found for the plaintiffs, subject to the opinion of the Court upon the following case.

That the defendant, Fishar, was a creditor of the partnership of Fordyce and Co., and on various occasions had done them many acts of friendship, and being already a creditor for £1300, upon the 6th of June, 1772, paid into the shop of Fordyce and Co., as bankers, the further sum of £7000, and had it written in his book according to the usual course; which sum he had borrowed for the purpose of accommodating the shop during the holidays; and at the time the money was paid in, he ordered the person who paid it to

tell them he should not draw the money out before the Friday following, which they were told accordingly.

On the 9th of June, Fordyce sat up all night settling his books and affairs in *contemplation of absconding*; and being possessed in his own separate right of the two notes described in the declaration, about five o'clock in the morning he enclosed them in a letter to Mr. Fishar, as follows:—To Mr. Fishar, “Mr. Fordyce conceiving that the money lodged by Mr. Fishar with his house on Saturday last, was a sum about which perhaps even some pains had been taken to place it there, he has the honour to *show him that preference* which he conceives is certainly his due.”

£ 5,500.

Collins and Co., 3rd July.

£11,702. 18s. 4d. T. W. Jolly, 20th June.

That Fordyce delivered the letter and notes to Mr. Harrison, his clerk, with directions to carry them to Mr. Fishar's office and give them to him. About six o'clock the same morning, Fordyce absconded and went to France. At half an hour after eleven o'clock the same morning a commission of bankruptcy duly issued against him. Harrison about ten o'clock the same day called at the defendant's office; not finding him at home, he returned again about twelve; but it being holiday time, the office was shut up. That on Thursday the 11th, Harrison delivered the letter with the notes to Mr. James, one of the partners of Fordyce, who sent for the defendant, when Mr. James, in the presence of the defendant and Mr. Bellamy, opened the said letter and delivered it with the notes to the defendant, who having read the same to the company present, took them away with him; that they remain in his possession, and that he refused to deliver them up. That Fordyce was indebted to the partnership in a larger sum than the amount of the notes in question.

The question in the opinion of the Court upon this state of the case was, “Whether the plaintiffs are entitled to recover in this action?”

This case was twice argued; first, in Easter Term by Mr. *Buller* for the plaintiffs, and Mr. *Allen* for the defendant; and now in this term by Mr. *Lee* for the plaintiffs, and Mr. *Dunning* for the defendant.

On the part of the plaintiffs it was insisted, that under the circumstances of this case it was not competent to Mr. Fordyce to give this preference to the defendant. For however fair the transaction might be as between the parties, yet a trader, in contemplation of an act of bankruptcy, cannot give a preference to any particular person, because it is a fraud upon the rest of the creditors, and against the general spirit of the bankrupt laws. This principle

is fully settled in the case of *Worseley v. De Mattos* (1 Burr. 474) where the Court held that an assignment of all the bankrupt's effects, though a fair transaction between the parties, and for a good and valuable consideration, was nevertheless fraudulent in respect of the other creditors; the object aimed at, being to give a preference which was unlawful.

The case of *Small v. Oudley*, cited in the case just mentioned, may be thought to be an authority the other way; but there no fraud was meant against the creditors: on the contrary, the Court said the whole transaction was beneficial to them, and the only person defrauded was Small. Besides, the only point decided in that case was, that a deed cannot be fraudulent in equity which would not amount to an act of bankruptcy at law.

But the present case is clearly distinguishable from *Small v. Oudley*. For here the defendant knew the shop to be in a desponding state when he advanced the money; the repayment was voluntary and without the knowledge of the defendant, in the very moment of absolute bankruptcy, and with a professed view of giving an undue preference. An additional circumstance is, that the notes were not delivered till after a clear act of bankruptcy was actually committed. For want therefore of the defendant's assent, the transaction was not complete, which alone is sufficient to render the payment void. There are two cases in which this objection made a principal ground in the determination the Court gave, *Hague v. Rolleston*, Hil. 8 Geo. III. (since reported, 4 Burr. 2174), and *Alderson v. Temple* (since reported likewise, 4 Burr. 2238, Pasch. 8 Geo. III.). But the reasoning and principles laid down in the latter case upon the question of preference are decisive of the present. Mr. *Buller* stated the opinion of the Court at large, *quod vide*, 4 Burr. 2829.

This doctrine is confirmed and strengthened by a case of very late date. *Linton v. Bartlett*, Hil. 10 Geo. III. C. B. M. S. The case was thus. The plaintiff's brother carried on his trade in two separate shops, an upper and an under one; being indebted to his brother, upon the 3rd of August he assigned over to him such of his goods as were in his upper shop, being one-third part only of his stock in trade; and this he did for the purpose of giving his brother a preference. The question was, whether this assignment was an act of bankruptcy? *Per Curiam*: "This is a very plain case; the deed and the transaction may have been very fair as between the parties; but in all these cases the object to be attended to is, *quo*

animo the transaction is done." Now the single question is, whether a man shall be allowed to commit a fraud upon the whole system of the laws concerning bankrupts, by giving a preference to one creditor in prejudice to the rest? Clearly he shall not; and here it being by deed, it is itself an act of bankruptcy. The great criterion is, whether the act be done in contemplation of becoming a bankrupt?

This is a decision expressly upon the point of preference in contemplation of bankruptcy; and no inconvenience can arise from fixing that as the moment when the curtain should drop. Here it is expressly found that the notes were sent in contemplation of committing an act of bankruptcy, and professedly with a view to give the defendant a preference. The act therefore is void, and the plaintiffs are well entitled to recover.

Mr. Dunning and *Mr. Allen* for the defendant.

Two questions arise in this case: First. Whether it is competent in law for a trader, in contemplation of an act of bankruptcy, to give a preference under any circumstances?

Secondly. If there be any case in which that preference may be given, whether this is one of those cases?

With respect to the first, it has been settled that a trader at the eve of bankruptcy may do everything that he might have done at any period antecedent to that time. But it has never been established that a trader shall at no time give a preference to a *bond fide* creditor. On the contrary, the case of *Small v. Oudley* (2 P. Wms. 427) is an authority expressly the other way. The circumstances were very like the present. On the 21st of September, 1720, Small, to accommodate his friends D. and J. Norcourt, transferred £500 South Sea stock to them upon condition it should be returned in ten days. Upon the 29th they made an assignment of *part* of their effects to Small, as a security for transferring £500 South Sea stock, reciting the truth of the case, and the next day absconded. Sir *Joseph Jekyll*, M.R., was clearly of opinion that this assignment was good. "That there may be just reason for a sinking creditor to give a preference to one creditor before another; to one that had been a faithful friend, and for a just debt lent to him in extremity; when the rest of his debts might be due from him as a dealer in trade, wherein his creditors might have been gainers; whereas the other may not only be a just debt, but all that such creditor has in the world to subsist upon. In this case, and so circumstanced, the trader honestly may, nay ought to give a

preference." He says further, "The time of the assignment is not material, provided it be before the bankruptcy; but the justness of the debt is very material, and the circumstance of the non-privy of the creditor to the assignment was very much in his favour."

It is plain therefore from this case, that antecedent to an act of bankruptcy actually committed, there may exist a case in which by law it is permitted to a trader to give a preference. The observation made by Lord *Mansfield* upon this case of *Small v. Oudley*, in the decision of *Worseley v. De Mattos*, tends to explain that the ground of the opinion was right. For, his Lordship said, "This case was very particular. The fraud was upon Small, and not upon the creditors. His stock was to be replaced in a week or ten days at furthest, £1800 of Small's money went to the creditors, and this security amounted but to £300. So that the whole transaction was beneficial to the creditors." Now every syllable and every circumstance upon which Sir *Joseph Jekyll* founded his opinion in that case, is not only applicable but actually to be found in the present.

The case of *Linton v. Bartlett* is inapplicable to this case; for the ground of that decision was that the assignment was an act of bankruptcy itself, and, being of *all* the goods in that shop, was within the same mischief as if it had been an assignment of the goods in both. It has been insisted that no inconvenience can arise if the line was to be drawn at the beginning of an insolvency. This is not so; for then all the creditors subsequent to the time when the Court determines that the line of distribution should be drawn, must be involved in the wreck. The contemplation of becoming bankrupt, is equally difficult to ascertain; but neither the point of insolvency nor the resolution to become bankrupt, is the period of bankruptcy; nor can the contemplation of bankruptcy be the true line to be drawn; for each is so indefinite and uncertain that the rule in either case would tend to endless litigation. It were to be wished, therefore, that the Court would settle the rule of preference according to the honesty or dishonesty of the transaction.

In *Alderson v. Temple*, Mr. Justice *Yates* said, there is no doubt but that an act of this sort may be done on the eve of a bankruptcy under fair and honest circumstances; and that in *Small v. Oudley* the justice of the case required it. With respect to the act being incomplete for want of the defendant's assent, in *Atkins v. Barwick* (1 Stra. 165) the assent was subsequent to the act of bankruptcy,

and the only question was, whether a subsequent dissent was necessary to divest the property. The Court held, that delivery vests property, unless divested by a subsequent dissent; and if founded upon good consideration is not countermandable. Here the delivery was unquestionably upon good consideration; and therefore as to the point of non-privity and assent, the authority is decisive.

The second question is, whether this is a case in which a preference may be given. And this, we have seen, depends upon the honesty of the transaction.

Now the purpose for which Mr. Fishar advanced this money was meritorious and friendly in the highest degree; the use to which Mr. Fordyce applied it, namely, to lessen the partnership debt, was just and honest; but his distresses were such as defeated the object, and therefore, what could be more fair, what more reasonable, what more distant from fraud than to return it? When returned, the creditors were precisely in the same situation as they would have been in, if it had never been advanced; and no doubt in itself the loan of the money was as friendly and in its consequences might have been as beneficial to them as it was intended to be to Mr. Fordyce.

Lord MANSFIELD, C.J., after stating the case, delivered his opinion as follows:—The defendant, Mr. Fishar, is certainly a very meritorious creditor of Mr. Fordyce; and in this last transaction did him a very great act of friendship. I have therefore been very sorry, as far as one can be said to be sorry in the administration of justice, that I could not see in this case any circumstance which could give rise to a question; for they are so very particular as not to lay the least foundation for one.

The question is, “whether the plaintiffs are entitled to recover in this action?” which depends on this: whether the property of the two notes was duly and regularly transferred before the act of bankruptcy? I say duly and regularly, because that excludes fraud.

There has been much argument upon a general question, “whether a trader, in contemplation of an act of bankruptcy, can give a preference to a *bond fide* creditor? Perhaps the stating it as a general question involves a great impropriety; because no trader can do an act of fraud, contrary to the spirit of the bankrupt laws, and to the injury of his creditors. He cannot assign his effects to all his *other* creditors in exclusion of *one* whom he thinks dishonest

or unjust ; nor even to be equally divided amongst all his creditors, because he cannot take his estate out of that management which the laws put it into. If any act of this sort is done by deed, it is not only void, but in itself an act of bankruptcy from the date of the deed. If without deed, it is void in respect of those whom it prejudices.

But all questions of preference turn upon the action being complete before an act of bankruptcy committed : for then the property is transferred ; otherwise, an act of bankruptcy intervening vests the property in the hands and disposal of the law.

In the case of *Worseley v. De Mattos*, whatever the Court might think of the case of *Small v. Oudley*, there was no intention to lay down that the determination of that case was wrong at that time. But no case ever came before us where we were warranted to say, that no case can exist of a legal preference. For if a man were to make a payment but the evening before he becomes bankrupt, independent of the Act of Parliament and in a course of dealing and trade, it would be good ; or suppose legal diligence used by a creditor, and an execution or *ca. sa.* is in the house, and under terror of that he makes an assignment and delivery of his effects, it would be valid, the object not being to give a preference, but to deliver himself. In *Cock v. Goodfellow* the act done was fair ; it was done several months previous to the act of bankruptcy, and was no more than what the Court of Chancery would have compelled the party to do. Where an act is done, and the single motive is not to give an unjust preference, the creditor will have a preference. In *Small v. Oudley*, upon a stipulation to replace so much stock, the day agreed upon was past ; the estate had had the benefit of the solemn agreement, and the bankrupts gave a security for part of the debt only ; a distinction was likewise taken because the security was upon their effects in a separate trade. That was a very favourable case, but I think it extremely shaken by the case of *Linton v. Bartlett* in the Common Pleas, which goes further than any other ; for that case has determined that though the act be complete, yet if the mere and sole motive of the trader were to give a preference, it shall be void ; and if by deed, is in itself an act of bankruptcy. In that case the money was advanced by the brother from motives of friendship and without interest. Possession of the goods was delivered instantly upon the assignment being made ; and a clear act of ownership exercised by the brother, by his exposing them to sale, and carrying on the trade ; nor had he the least knowledge or

suspicion of the insolvency. But the material circumstances which made that a fraudulent act were these: the brother did not arrest, or threaten or even call upon the bankrupt for money; but the bankrupt of his own *voluntary* act gave him the assignment, with what intent? Why, to give him a preference. The goods assigned were not more than one-third of his effects. Upon what then was the opinion of the Court founded? Not upon one-third being the same as an assignment of all his effects; but upon the trader's giving a preference: and upon his sole motive being to do so. If he can give it to one he can give it to another; which would establish this principle, that a bankrupt may apportion his estate amongst his different creditors as he thinks proper. The case goes further than any former decision. It had before been held, in *Worseley v. De Mattos*, that an assignment of *all* was a clear act of bankruptcy, and an exception of part, if colourable or fraudulent, will not take it out of the general rule.

But the present case affords no circumstances that can give rise to a question. A trader at five o'clock in the morning, just going to commit an act of bankruptcy, orders his servant to take certain bills to a creditor in discharge of a debt, pursuant to no contract—in the performance of no obligation—in no course of dealing, without the privity of the creditor or call on his part for the money, and without a possibility of the notes being delivered before an act of bankruptcy was committed. This is an order how his effects shall be apportioned after his bankruptcy. He delivers the letter to his own servant, and might have countermanded it; here it falls in with the case of *Temple v. Alderson* and *Hague v. Rolleston*. The act was not complete; and therefore the act of the bankruptcy revoked it. Suppose the drawers had been insolvent; was Mr. Fishar bound to take the notes in satisfaction of his debt? Besides, the amount of the notes exceeded the debt by several hundred pounds. But what is the nature of the transaction upon the face of the letter? It is in terms a declaration that he means to give a preference. This the law does not allow; and if it had been by deed it would itself have been an act of bankruptcy. But it is much stronger where the trader mentions that to be his sole motive; and where the act cannot be completed till after an act of bankruptcy actually committed.

The three other Judges were of the same opinion.

Lord *Mansfield*, C.J., added, that if a preference were only consequential, the case might be different; as if a payment were made

or an act done in pursuance of a prior agreement. His Lordship further observed that with respect to the case of *Atkins v. Barwick* (1 Stra. 165) the judgment seemed to be right, but the reasons wrong. The true ground was, that the trader very honestly refused to accept the goods and returned them.

In the well-known cases of *Worsey v. De Mattos* and *Harman v. Fishar* (commonly called *Fordyce's case*), the doctrine relative to fraudulent preference on the part of a trader was very fully discussed, and the policy of the bankrupt laws upon this important subject, and the rules by which it is carried out, were very clearly enunciated by Lord *Mansfield*.

A conveyance or transfer of property by a trader may be fraudulent, and as such an act of bankruptcy, either as being within 18 Eliz. c. 5, or as being in contravention of the policy of the bankrupt laws.

Any transfer which is fraudulent within the meaning of the statute of Elizabeth, is also fraudulent and an act of bankruptcy under the Bankrupt Act (see Smith's *Lead. Cas.* vol. i. p. 16), and is void also as against the assignees upon an insolvency (*Doe d. Grimby v. Ball*, 11 M. & W. 531), although a conveyance or transfer, fraudulent within the meaning of the bankrupt laws, would not necessarily be so under the statute of Elizabeth; in other words, the Bankrupt Act, which relates solely to conveyances or transfers by traders, is more extensive than the

statute of Elizabeth, which relates to conveyances and transfers by debtors generally, independently of the fact whether they are traders or not.

This being the case, it is not considered necessary in a work of this kind to examine the authorities upon the statute of Elizabeth, but the reader is referred to the note to *Twyne's case* (1 Smith's *Leading Cases*, 10), where they are collected and commented on.

With regard to the doctrine of fraudulent preference under the bankrupt laws, it is at present regulated by the 67th section of 12 & 13 Vict. c. 106, s. 67, re-enacting the 3rd section of 6 Geo. IV. c. 16, which repealed 1 Jac. I. c. 16, s. 2, so much commented on in the principal cases, and which was in effect substantially the same.

The 67th section of 12 & 13 Vict. c. 67, is as follows:—"That if any trader liable to become bankrupt shall . . . make, or cause to be made, either within this realm or elsewhere, any *fraudulent* grant or conveyance of any of his lands, tenements, goods, or chattels, or make or cause to be made any fraudulent surrender of any of his copyhold lands or tenements, or

make or cause to be made any fraudulent gift, delivery, or transfer of any of his goods or chattels, every such trader doing, suffering, procuring, executing, permitting, making, or causing to be made any of the acts, deeds, or matters aforesaid, *with intent to defeat or delay his creditors*, shall be deemed to have thereby committed an act of bankruptcy."

The policy of the bankrupt laws has in view two main objects, viz. the management of the bankrupt's estate, and an equal distribution thereof among his creditors; any conveyance or transfer therefore which is intended either to give a preference to a particular creditor or class of creditors, or which even without attempting to prevent an equal distribution amongst creditors, aims at retaining in the hands of trustees the distribution of the trader's estate, will be considered as being executed contrary to the policy of the bankrupt laws, with intent to defeat or delay his creditors, and it is therefore *fraudulent*, and an act of bankruptcy.

A conveyance or assignment by a trader of *all* his property as a security to a creditor for a pre-existing debt, is fraudulent and an act of bankruptcy, not only because he thereby deprives himself of the power of carrying on his trade, and withdraws his effects from the reach of his other creditors, but, according to Lord Mansfield's language in the principal case of *Worseley v. De Mattos*, because such a conveyance must either be fraudulently

kept secret, or produce an immediate absolute bankruptcy. (See *Lindon v. Sharp*, 7 Scott, N. R. 745; *Hassells v. Simpson*, 1 Doug. 89 n.; 1 Cook B. L. 88; *Butcher v. Easto*, 1 Doug. 295; *Law v. Skinner*, 2 Bl. Rep. 996; *Porter v. Walker*, 1 Scott, N. R. 568; *Graham v. Chapman*, 12 C. B. 85; *Smith v. Cannan*, 2 Ell. & Bl. 35.) And it is immaterial that at the time when the trader executed such a conveyance or assignment he was pressed by his creditor (*Johnson v. Fesenmeyer*, 25 Beav. 88, 91), or even that he was under arrest for a just debt at his suit. Thus in *Newton v. Chantler*, 7 East, 138, a trader being under arrest at the suit of a creditor for a just debt, executed to him a bill of sale of *all* his effects, in trust to satisfy his debt, and pay over the surplus, if any, to the trader. It was held by the Court of King's Bench to be an act of bankruptcy. "As," said Lawrence, J., "the necessary consequence of this deed of conveyance was to take the whole effects of the trader, which the law says shall be distributed equally amongst all the creditors, and to give them to a particular creditor, this is within all the cases an act of bankruptcy, and it is not the less the grant or conveyance of the bankrupt to the prejudice of his other creditors, because at the time he made it he was under arrest at the suit of the defendant." See also *Butcher v. Easto*, 1 Doug. 295. It is immaterial, likewise, that

the trader executing such assignment of all his goods retains possession of them (*Stewart v. Moody*, 1 Cr. M. & Rosc. 777; *Simpson v. Sikes*, 6 Mau. & Selw. 314), or that possession is immediately taken by the grantee. *Newton v. Chantler*, 7 East, 138. And it is likewise immaterial that the deed does not on the face of it purport to transfer *all* the bankrupt's property, if the evidence satisfactorily shows that it did in fact substantially convey all the property he had at that time. *Lindon v. Sharp*, 7 Scott, N. R. 730, 744.

A conveyance by a trader of all his effects at a given place is not an act of bankruptcy, unless it be shown that he has no other property. *Chase v. Goble*, 3 Scott, N.S. 245; 2 Man. & Gr. 930.

Where a trader, in consideration of a *present payment and a by-gone debt*, by deed conveys all his property, including the advance, and any property purchased with the advance, as he will by such deed necessarily defeat and delay his creditors, it is therefore an act of bankruptcy. See *Graham v. Chapman*, 12 C. B. 85. There a trader, in consideration of a past debt of £240 and a present advance of £200, conveyed by deed substantially the whole of his property, giving the transferee a right to seize and take all future acquired property, even though it should be purchased with the money which was alleged to be the consideration for the transfer. It was held by the Court of Exchequer Chamber, that the execu-

tion of the deed was an act of bankruptcy, within the statute 12 & 13 Vict. c. 106, s. 67. "The sale of the *whole* of a trader's stock," said *Jervis*, C.B., "to a *bond fide* purchaser, for a fair price, has been held not to come within the rule, even though creditors may ultimately be delayed or defeated, and the misapplication of the proceeds was contemplated by the trader at the time of the sale, because the trader gets a present equivalent for his goods, and the sale is strictly in the course of his business; and of course the sale of part of a trader's stock for the fair price by that part cannot be objected to. But the sale of the whole for the price of a part, not because the trader is obliged, under pressure, to sell his stock for less than its value, but because an old debt is taken as part of the price, though it may not be the moving cause of the transfer, admits of a different consideration, and might be held to be an act of bankruptcy without conflicting with former decisions. It comes within all the mischiefs referred to by the counsel for the plaintiffs, as deduced from the older cases. The trader gets no equivalent for his stock; and the transfer having the effect of defeating and delaying his creditors, would be a fraudulent transfer with intent to effect that object. But in this particular case, the form of the deed makes it unnecessary further to consider the general question. It recites that the transfer was made, not only for the further

advance, but also for the old debt; and it passes not only all the trader's stock, and the money advanced, if he then had it in his possession, but it also professes to give to the defendant a right to take all future-acquired property, even though it should be purchased with the money which is alleged to be the consideration for the transfer. The trader therefore gets no equivalent for any part of the stock transferred; and such a transfer necessarily defeats and delays his creditors, and is an act of bankruptcy without fraud in fact." See the remarks on this case in *Hutton v. Cruttwell*, 1 Ell. & Bl. 15, 25; and *Smith v. Cannan*, 2 Ell. & Bl. 35; sed vide *Young v. Waud*, 8 Exch. 221; *Bell v. Simpson*, 2 Hurlst. & N. 410.

A mere exception of a *part* of a trader's property from a general assignment of all, if colourable or fraudulent, as is laid down in *Worseley v. De Mattos* and *Harman v. Fishar*, will not take the case out of the general rule, inasmuch as it will be considered an act of bankruptcy. See *Wedge v. Newlyn*, 4 B. & Ad. 831; *Ex parte Bailey*, 3 De Gex, Mac. & G. 534; *Lindon v. Sharp*, 6 Man. & Gr. 895; *Ex parte Bland*, 6 De G. Mac. & G. 757; *Ex parte Sparrow*, 2 De G. Mac. & G. 907; *Stanger v. Wilkins*, 19 Beav. 626; *Hale v. Alnutt*, 18 C. B. 505; *Bell v. Simpson*, 2 H. & N. 410; *Young v. Waud*, 8 Exch. 221.

It is immaterial when a trader assigns the whole, or the whole with a mere colourable exception,

of his property, whether the assignment be absolute or merely by way of security; nor will the result be different, although the property assigned as a security exceeds very considerably the value of the liabilities for which it is pledged, or that there is an express trust of the surplus for the benefit of the assignor. *Smith v. Cannan*, 2 Ell. & Bl. 35, 44. The reason given for this is that "the whole property is conveyed, and put out of the immediate reach of the trader and of his creditors; the fact that there is a substantial surplus may prevent the deed from ultimately defeating the creditors; but it does *delay* them; for they are deprived of the power of taking that surplus under a *fieri facias*. In equity it is true that the debtor's interest in the surplus may be taken, but the real test is, has the trader by the deed put his property out of his control, so as to deprive himself of the present power to satisfy his creditors, as but for the deed he might do?" *Id.*

It is true that in some cases the judges seem to have confined the operation of the rule to cases where the assignment had the effect of stopping the trade of the assignor; but on examining them it will be seen that the language of the judges must be taken with reference to the facts under discussion before them, and that in all those cases the facts were such that the trade was stopped, and the minds of the judges were directed to that effect only. The

real test, according to the more recent decisions, in ascertaining whether an assignment of a trader's property with the exception of a part amounts to an act of bankruptcy, is not whether the necessary effect of the deed is to stop the trade, but whether its necessary effect is to *delay the creditors* of the trader. Hence it has been held that an assignment by way of mortgage by a trader of his stock and implements of trade, where such assignment does not include a moiety of the whole of his effects, is not *per se* an act of bankruptcy, although the effect of putting the instrument in force would be to stop the business. *Young v. Waud*, 8 Exch. 221; *Carr v. Burdiss*, 1 Cr. M. & Rosc. 443; *Smith v. Cannan*, 2 Ell. & Bl. 45.

A conveyance of all a trader's property, which has the effect of delaying the *general* creditors, even though all the stock in trade is excepted, and the *trade* creditors are not delayed, will, it seems, be an act of bankruptcy. Thus in *Smith v. Cannan*, 2 Ell. & Bl. 35, Garnham, a farmer, conveyed all his farming stock and goods to Smith by bill of sale, by way of security for £900, with a power of sale. The property comprised in the bill of sale was of about the value of £2,800, and there was a trust for the assignor of the surplus of the property comprehended in the bill of sale, which was the whole of the assignor's property, with the exception of two shares in a joint stock

bank of the value of £17. 10s. each. Smith seized and sold enough of the stock and goods to pay the amount secured. Garnham was declared a bankrupt as a banker. The bill of sale was *bond fide* given under pressure, and the trade of the bank was not affected by giving it. On trover by the assignees of the bankrupt against Smith, issues being joined on pleas of not guilty and not possessed, and the judge at *nisi prius* having ruled that these facts were evidence on which the jury might find a verdict for the plaintiff, it was held by the Exchequer Chamber on a bill of exceptions that the direction was right. "The only question," said *Parke*, B., "is whether there can be such a complete assignment of the trader's property as necessarily to delay his creditors, *when the assignment does not include his trade effects*. There can be no doubt that when the whole of the trader's property passes, that is evidence that the assignment is an act of bankruptcy. I am clearly of opinion that the exception in this case makes no difference. The supposition that it does is founded on a misapprehension of the reasons given by the judges in the older cases, founded on expressions used by them with reference to the particular circumstances under discussion in these cases. The test is, not whether the necessary effect of the deed is to stop the trade, but whether its necessary effect is to delay the creditors of the trader." With reference to

those cases in which it has been held that a conveyance of all a trader's property in trust for his creditors, is an act of bankruptcy, Lord *Eldon* lays down two principles: first, that by that act the trader necessarily, perhaps not intending it, deprives himself of the power of carrying on his trade; secondly, that he endeavours to put his property under a different course of application and distribution among his creditors from that which would take place under the bankrupt law. *Dutton v. Morrison*, 17 Ves. 199; *Ex parte Bourne*, 16 Ves. 148; *Lindon v. Sharp*, 7 Scott, N. B. 745; *Stewart v. Moody*, 1 Cr. M. & Rosc. 777; *Leake v. Young*, 5 Ell. & Bl. 955.

A conveyance by a trader of all his property upon trust either for a particular creditor (*Wilson v. Day*, 2 Burr. 827; *Hassel v. Simpson*, 1 Bro. C. C. 99; Dougl. 89 n.; *Hooper v. Smith*, 1 W. Black. 442; *Newton v. Chantler*, 7 East, 138), or for a certain number of creditors (*Ex parte Foord*, cited *ante*, p. 448; *Alderson v. Temple*, 4 Burr. 2240; *Butcher v. Easto*, Dougl. 295; *Devan v. Watts*, Dougl. 86; *Hooper v. Smith*, 1 Wm. Black. 442), or even for all his creditors at large, and although it be for the purpose of effecting an equal distribution amongst them (see *Eckhart v. Wilson*, 8 T. B. 140; *Tappenden v. Burgess*, 4 East, 230; *Kettle v. Hammond*, 1 Cooke, B. L. 108, 3rd ed.; *Simpson v. Sikes*, 6 Mau. & Selw. 312), will

be an act of bankruptcy. But it seems that in order that such deed may be avoided, it is material to show the continued existence of a debt due at the time of the execution of the deed (*Ex parte Taylor*, 5 De G. Mac. & G. 395; *Ex parte Thomas*, 1 De Gex, 612), as it is not void as against future creditors. *Oswald v. Thompson*, 2 Exch. 215; *sed vide Stevenson v. Newnham*, 13 C. B. 295.

It might at first sight appear difficult to say how such a deed as an assignment in favour of all creditors should be considered as a *fraudulent deed*, so as to bring it within the provision of the 67th section of the Bankrupt Act. Perhaps the difficulty may be got over by such reasoning as was used by *Jervis*, C. J., in a recent case, viz. that every person must be taken to intend that which is the necessary consequence of his own act; and if a trader make a deed which has the effect if not of defeating, at any rate of delaying his creditors, he must be taken to have made the deed with that intent. But a deed which has the effect of defeating or delaying a trader's creditors, is by the policy of the bankrupt law a fraudulent deed; and therefore a deed which has that effect is, in the terms of the Act, a fraudulent transfer of the trader's goods, with intent to defeat or delay his creditors." *Graham v. Chapman*, 12 C. B. 103.

Such a trust-deed executed by a trader in favour of creditors will be an act of bankruptcy, though

there be in the deed a proviso declaring it void, if the trustees think fit (*Tappenden v. Burgess*, 4 East, 230); or, if all the creditors shall not execute, the acts of the trustees to be good in the meantime (*Back v. Gooch*, 4 Campb. 232; S. C. Holt, 13); or if all the creditors to a certain amount shall not execute by such a time, or a commission in bankruptcy shall issue (*Dutton v. Morrison*, 17 Ves. 193), and though the deed was not intended to be carried into execution, but was merely intended for the purpose of making the trader a bankrupt. *Tappenden v. Burgess*, 4 East, 230, 237; *Simpson v. Sikes*, 6 Mau. & Selw. 295.

If a deed of assignment purporting to be made by all three partners of a firm, and to convey all their personal estate and effects whatsoever in trust for the benefit of creditors, be executed by one of them only, it will operate to convey the share of the one who so executes, and operates as an act of bankruptcy by him. *Bowker v. Burdekin*, 11 M. & W. 128; sed vide *Dutton v. Morrison*, 17 Ves. 196. It would be otherwise if the deed were executed merely as an escrow.

Formerly an assignment executed abroad was held not to be an act of bankruptcy in England (*Norden v. James*, 2 Dick. 533; *Ingliss v. Grant*, 5 T. R. 530); but the Bankrupt Act now comprehends such assignments, sect. 67.

It has been held in equity that

where a trader making an assignment of all his property to trustees, retains the whole beneficial interest in it, and merely vests it in their hands for the more ready conversion of the profits, to enable him to arrange with his creditors, it will not be an act of bankruptcy. See *Greenwood v. Churchill*, 1 My. & K. 546. There a trader entitled to large freehold and leasehold estates, but greatly embarrassed, and having committed acts of bankruptcy, conveyed his freehold and leasehold estates to trustees, upon trust to sell or mortgage, and to apply the proceeds as he should direct. It appeared that the trust was executed under advice for the purpose of effecting a conversion of the trader's property, with a view to an arrangement with his creditors, to which he was himself considered incompetent from the state of his health. It was held by Sir J. Leach, M. R., that the trust-deed was not an act of bankruptcy. "By the trust-deed," said his Honour, "the whole beneficial interest in the property continued as open as it was before, to the execution of the creditors; and unquestionable evidence proves that the deed was not executed with the intent to defeat or delay the creditors of the bankrupt, but rather with a view to advance the arrangement with them, by placing in more efficient hands the conversion of that property to which the bankrupt, from the state of his health, was considered to be unequal." See also *Berney v. Davison*, 1

Brod. & Bingh. 408; 4 Moore, 126; but see the remarks, 12 C. B. 102; 2 Ell. & Bl. 44.

No creditor who has executed (*Bamford v. Baron*, 2 T. R. 594), or been privy to, or acted under a deed of assignment by a debtor in favour of his creditors, nor any person as his representative, can afterwards set up such a deed as an act of bankruptcy. *Back v. Gooch*, 4 Camp. 234; *Ex parte Cawkwell*, 1 Rose, 313; *Ex parte Shaw*, 1 Madd. 598; *Ex parte Kilner*, Buck, 104; *Ex parte Battier*, ib. 426; *Ex parte Tealdi*, M. D. & D. 210; *Marshall v. Barkworth*, 4 B. & Ad. 508. It is no objection however that some of the assignees may have executed such a deed. *Tappenden v. Burgess*, 4 East, 230. A trust-deed which could not have been impeached under a fiat sued out by any creditor, cannot be impeached under the bankrupt's own fiat. *Ex parte Philpott*, 1 De Gex, 346; *Ex parte Louch*, ib. 463; *Ex parte Lofts*, ib. 612.

Although a creditor gives his assent to a proposal of a trader to assign his effects for the benefit of his creditors, yet if the deed contains an unexplained stipulation in favour of a particular creditor, the first-mentioned creditor is not bound by the deed, but may take proceedings upon it as an act of bankruptcy. *Ex parte Marshall*, 1 Mont. D. & D. 575.

A trustee may be a petitioning creditor (*Hope v. Moek*, 10 Exch. 829), but not, it seems, unless his *cestui que trust* acquiesce. *Ex parte Gray*, 2 Mont. & Ayr. 283.

It may be here mentioned that a conveyance by a trader of *part* of his property for the *benefit of his creditors*, does not amount to an act of bankruptcy, except in cases of express fraud. See *Cattell v. Corrall*, 4 Y. & C. Exch. Ca. 228.

From the observations already made, it is evident that any one creditor who had not either executed or been privy to or acted under a deed of conveyance by a trader in favour of his creditors, might by taking proceedings in bankruptcy nullify the deed, although its provisions might be most beneficial to all parties. To prevent this being done to an injurious extent, it has been enacted "that if any such trader shall execute any conveyance or assignment by deed of *all* his estate and effects to a trustee or trustees for the benefit of *all* the creditors of such trader, the execution of such deed shall not be deemed an act of bankruptcy, unless a petition for adjudication of bankruptcy be filed within three months from the execution thereof, provided such deed shall be executed by every such trustee within fifteen days after the execution thereof by the trader, and the execution by the trader and by every such trustee be attested by an attorney or solicitor, and notice thereof be given within one month after the execution thereof by such trader, in case such trader reside in London, or within forty miles thereof, in the 'London Gazette,' and also in two London daily newspapers;

and in case such trader does not reside within forty miles of London, then in the 'London Gazette' and in one London daily newspaper and one provincial newspaper published near to such trader's residence; and such notice shall contain the date and execution of such deed, and the name and place of abode respectively of every such trustee and attorney or solicitor." 12 & 13 Vict. c. 106, sect. 78.

An assignment of a *part* merely of a trader's effects, even on account of a pre-existing debt, does not, like an assignment of the *whole*, contain within itself the evidence of a fraud. *Balme v. Hutton*, 2 Y. & J. 101; *Hale v. Allnutt*, 18 C. B. 505; and see *Chase v. Goble*, 2 Man. & Gr. 930. This distinction is well pointed out by Lord *Mansfield*, C. J., in the principal case of *Worsley v. De Mattos*, where he observes that "there is a great difference between the conveyance of *all* and of a *part*. A conveyance of a *part* may be public, fair, and honest, for as a trader may sell, so he may openly transfer many kinds of property, by way of security; but a conveyance of all must either be fraudulently kept secret, or produce an immediate absolute bankruptcy." *Ante*, p. 448.

An assignment however of a *part* of a trader's effects, or a payment made in satisfaction, or to secure a pre-existing debt, will be fraudulent, if it were made in contemplation of bankruptcy, and

with the view of giving a particular creditor an advantage over other creditors—the intent being in fact "to defeat or delay" them.

To constitute however a fraudulent preference in such cases two things must concur: first, such payment, delivery, or transfer, must be made in contemplation of bankruptcy; secondly, it must be made voluntarily.

With regard to what will be considered a payment made in contemplation of bankruptcy, this is a matter of fact for a jury to determine; and it seems that embarrassed circumstances are not conclusive evidence of the contemplation of bankruptcy. Per *Park, J.*, in *Belcher v. Prittie*, 10 Bing. 419. Moreover a disposition made under a mere consciousness of insolvency, will not be sufficient to enable the assignees of a bankrupt to recover back the money or chattels so disposed of, inasmuch as it is essential, in order to enable them to do so, that the disposition should be made in *contemplation of bankruptcy*. Thus in *Atkinson v. Brindall*, 2 Bing. N. C. 228, a fiat had been issued against Potter on February 14th, 1834. This was not proceeded with; but on the 15th of March, Potter executed an assignment of his effects in trust for creditors, under which they were to have only 15s. in the pound. Between that time and January, 1835, the defendant had lent him upwards of £200. On the 13th of January, two bills due from Potter were dishonoured,

and he was obliged to ask for time; but on the 15th, without any demand on the part of the defendant, Potter sent him cash and bills to the amount of £205. On the 23rd of January, a second fiat issued, under which Potter was declared a bankrupt, and the plaintiffs were his assignees. *Williams, J.*, before whom the cause was tried, told the jury that to entitle the plaintiffs to recover, Potter must have had bankruptcy in contemplation at the time of the payment; that it would not avail them that he was in insolvent circumstances, and contemplated insolvency. A verdict having been found for the defendant, a new trial was moved for upon the before-mentioned state of facts, it being contended that Potter's knowledge of his own insolvency, when he paid the defendant, must render it a payment made in contemplation of bankruptcy; that contemplation of bankruptcy meant a reasonable expectation that bankruptcy must ensue, and that therefore the jury ought not to have been directed as the learned judge had directed them on the subject of insolvency. The rule however was refused by the Court of Common Pleas, *Tindal, C. J.*, making the following observations:—“In *Morgan v. Brundrett* (5 B. & Ad. 296), Mr. Justice *Littledale* says, ‘The late cases, with reference to the question whether a payment or delivery of goods has been made in contemplation of bankruptcy, have gone much further than they

ought.’ Mr. Justice *Parke*: ‘In order to render the deposit void, it was incumbent on the plaintiffs to show, first, that it was made in contemplation of bankruptcy; and secondly, that it was voluntary. There was very slight evidence that it was made in contemplation of bankruptcy. The meaning of those words I take to be, that the payment or delivery must be with intent to defeat the general distribution of effects which takes place under a commission of bankruptcy. It is not sufficient that it should be made (as may be inferred from some of the late cases) in contemplation of insolvency. These cases I think have gone too far.’ And Mr. Justice *Patteson*: ‘The recent cases have gone too great a length; they seem to have proceeded on the principle that if a party be insolvent at the time when he makes a payment or delivery, and afterwards become bankrupt, he must be deemed to have contemplated bankruptcy at the time when he made such payment; but I think that is not correct, for a man may be insolvent, but yet not contemplate bankruptcy.’ I think therefore that the direction to the jury in this case was substantially correct. Up to the time of an act of bankruptcy, every trader has dominion over his own property; the only exception is, that where he contemplates bankruptcy and the protection afforded by the bankrupt laws, a disposition of property made with a view to defeat the equal distribution provided by

those laws is fraudulent and void, but not a disposition made under a consciousness of mere insolvency. I agree in thinking that the cases on this subject have gone too far. As to the evidence here, I am not prepared to say that the jury were wrong, and we ought not lightly to infringe on their province." See also *Aldred v. Constable*, 4 Q. B. 674; *In re Ryan*, 3 Ir. Ch. Rep. 83. Lord Chief Justice Tindal, C. J., in a passage which has been cited with approbation by Lord Justice Knight Bruce (*Ex parte Simpson*, 1 De. G. 19), takes rather a different view from that to be gathered from the cases before cited, for he says: "Where a party is in so hopeless a state of insolvency that he cannot reasonably expect to avoid bankruptcy, though he chooses to fight it off as long as possible, I cannot look upon a payment voluntarily made by him to a favoured creditor in any other light than as a payment calculated and intended to defeat the bankrupt laws." *Gibson v. Boutts*, 3 Scott, 229.

A payment or transfer made to a creditor, is clearly not fraudulent as *being voluntary*, if it be made in consequence of an act of the creditor, as when he threatens proceedings against the debtor in any of the courts of law (*Thompson v. Freeman*, 1 T. R. 155) or bankruptcy (*Ex parte Whitby*, Mont. & C. 671), or in a criminal court (*De Tastet v. Carroll*, 1 Stark. 88; *Ex parte De Tastet*, Mont. 138, 153), or where there is

a demand accompanied with pressure on the part of the creditor. *Cosser v. Gough*, 1 T. R. 156 n.; *Smith v. Payne*, 6 T. R. 152; *Crossby v. Crouch*, 2 Campb. 166; 11 East, 256.

A mere demand moreover for a debt, even if it be not then due, will be sufficient to render a payment or transfer good; for it appears to be clear that a threat or pressure, with an immediate power of rendering it available by taking legal steps, is not essential. Thus, for instance, "a surety for a bankrupt, or one to whom a debt is due, but not payable, may obtain a valid preference though he has no present power of proceeding against the bankrupt. To defeat a payment or transfer made to a creditor, the assignees must show it to be fraudulent as against the body of creditors entitled under the fiat, by proving it to be voluntary on the part of the bankrupt, and in contemplation of his bankruptcy; and if it is made in consequence of the act of the creditor, it is not voluntary." Per Parke, B., in *Van Casteel v. Booker*, 2 Exch. 706; and see *Hartshorn v. Slodden*, 2 Bos. & P. 582; *Hale v. Allnutt*, 18 C. B. 505; *Belcher v. Prittie*, 10 Bing. 408; *Mogg v. Baker*, 4 M. & W. 348; *Johnson v. Fessenmeyer*, 25 Beav. 90, 91.

It is not essential in order to render a preference fraudulent, that the person making it should be intended to benefit, or in fact benefit a particular creditor. Thus in *Marshall v. Lamb*, 5 Q. B. 115,

the plaintiffs were assignees of a bankrupt who had borrowed £700 from the defendant on a mortgage of his wife's estate, settled to her separate use for life, of some leaseholds belonging to his sister, and a policy of insurance belonging to the bankrupt, who also covenanted to pay the £700 and interest. When he was in desperate circumstances, and in contemplation of bankruptcy, he took the money to the defendant, who at first declined to receive it, but on being paid the then accruing half-year's interest, accepted the money, and gave the bankrupt the title-deeds and the policy. It was held by the Court of Queen's Bench that the payment of the £700 and interest amounted to a fraudulent preference. "The plaintiff's counsel," said Lord Denman, C. J., "contended that all which is required to constitute a fraudulent preference is found in these circumstances; the undisputed contemplation of approaching bankruptcy, the subtraction of his money from the fund to be distributed among his creditors, the voluntary selection of one of these creditors without pressure or application on his part; and though the object was admitted to be a direct benefit to the plaintiff, his wife, and sister, and the creditor was in no wise benefited, as he gave up the deeds on receiving the money, yet he was the party preferred at the expense of the estate; and the ulterior object can make no difference in the application of the law. On the other

hand, the language of the exceptions in the bankrupt acts was said to confine their operation to cases where a personal benefit to the preferred creditor is intended. Reliance was placed on some expressions of Lord Abinger and the Court of Exchequer in *Turquand v. Vanderplank* (10 M. & W. 180). We cannot relieve ourselves from a sense of the great difficulty that surrounds this question; but upon consideration we adhere to the opinion expressed by the learned judge on the trial. If the property in mortgage had belonged to the bankrupt, the payment by him would not have been a fraudulent preference, because the assignees would have had the mortgaged property, and it is indifferent to them whether they have the property free from the mortgage (supposing it to exceed in value the amount of the mortgage), or the property subject to the mortgage, and the amount by the mortgage money in cash; but here the *property*, except the policy, *belonged to others*. Yet the defendant was a creditor of the bankrupt, because the money was lent to him, and he covenanted to repay it; the payment therefore was emphatically a payment of the bankrupt's debt in order to release the property of his friends which they had mortgaged for his benefit; the defendant therefore did receive twenty shillings in the pound out of the bankrupt's estate to the prejudice of other creditors, although it was no benefit to him, for he would have been as

well off if he had kept the mortgage deeds. Suppose the bankrupt had borrowed money from the defendant on the joint and several note of himself and a perfectly sufficient solvent surety, and had voluntarily and in contemplation of bankruptcy paid off the note in order to relieve the surety, the defendant (the lender) would derive no benefit, for the solvent surety would be as good to him as money; yet would not this be a fraudulent preference? In that, as in the present case, it seems to us that the creditor (*quoad* the bankrupt's estate) is preferred; he receives out of that estate twenty shillings in the pound, whereas the other creditors do not; and he is preferred fraudulently, *quoad* the bankrupt's intention; and though the motive for giving that preference was ultimate advantage to himself and his own family, and not to the creditor, we think the preference fraudulent and the payment void."

Payment by a trader who contemplates bankruptcy, of a debt not then due, upon a *bonâ fide* request of the creditor, is not a voluntary payment; the fact of the debt not being due is merely a circumstance for the jury in considering the question of fraudulent preference. *Strachan v. Barton*, 11 Exch. 647; see also *Hartshorn v. Slodden*, 2 B. & P. 582.

The payment of a debt by a cheque was held by *Knight Bruce*, C. J., to be a fraudulent preference, under 6 Geo. IV. c. 16,

there being nothing in the context of that Act to limit the construction of the words "goods or chattels," so as to prevent money from being comprised in them. *Ex parte Simpson*, 1 De Gex, 9, 21, 27. The contrary opinion seems to have been held by *Tindal*, C. J., in *Bevan v. Nunn*, 9 Bing. 107, and by Lord *Tenterden*, C. J., in *Abell v. Daniell*, M. & Malk. 370. The construction put upon the Act by *Knight Bruce*, C. J., appears to be the best, and it is certainly the most rational, for as he well observes,—“Surely money must be as much within the mischief against which the statute was intended to guard, within the evil or wrong which it was intended to remedy in this respect, as any other goods or chattels. Can it be reasonable that a man paying to a creditor in satisfaction, total or partial, of his debt, or giving to a relative £1000 in money, should not commit an act of bankruptcy, when, if under precisely the same circumstances, he had, instead of money, delivered to the creditor, in satisfaction, total or partial, of his debt, or given to the relative plate, jewels, pictures, merchandises, or bills of exchange of the same value, he could commit an act of bankruptcy?” *Ex parte Simpson*, 1 De Gex, 21.

A bill of exchange was held to be a chattel within the meaning of 6 Geo. IV. c. 16, s. 3, the fraudulent delivery of which constituted an act of bankruptcy. *Cumming v. Bailey*, 6 Bing. 363.

The accidental consequence of a trader's giving notice of his being about to stop payment, whereby he is compelled to pay a debt, will not amount to a fraudulent preference. Thus in *Belcher v. Jones*, 2 M. & W. 258, a banking firm was in insolvent circumstances, and about to stop payment. Lee, a partner in the firm, informed his brother-in-law of the fact, in order that Cooke, the brother-in-law's father, and one of the managing directors of an insurance company, which banked with the firm, might draw his private balance out of the bank; but Lee desired Cooke not to give any information of the matter to a Mr. Davies, who was a shareholder in the insurance company, as he did not wish any of the directors to know anything of it. Cooke's private balance was in consequence drawn out the next day. On the evening of that day, Lee informed Cooke of the state of the house. Cooke, being a managing director of the insurance company, took measures by which the company's account was drawn out by a cheque. Two days afterwards the house stopped payment. It was held by the Court of Exchequer that this was not a fraudulent preference of the insurance company.

The questions whether a transaction on the part of a bankrupt is made in contemplation of bankruptcy, and whether it is voluntary, are questions of fact for the determination of a jury. *Fidgeon v. Sharpe*, 5 Taunt. 539; *Cook v. Pritchard*, 5 Man. & Gr. 329; *Be-*

van v. Nunn, 9 Bing. 107; *Belcher v. Prittie*, 10 Bing. 408; *Strachan v. Barton*, 11 Exch. 647. It seems even when importunity and pressure have been made use of by a creditor to obtain payment, it will still remain a question for the jury whether the payment has been made in consequence of such importunity and pressure or with a view of giving one creditor a fraudulent preference over the rest. *Cook v. Pritchard*, 6 Scott, N. R. 34; 5 Man. & Gr. 329. And on a motion for a new trial the Courts require to be fully satisfied that the verdict is wrong before they can take upon themselves to disturb it. *Belcher v. Prittie*, 10 Bing. 414, 421. "Because," as observed by *Tindal*, C. J., "where a case involves not matter of law, but that which is purely a question of fact, and that fact has been submitted to those whom the law has constituted the *judices facti*, we are not at liberty to take away from the party the right which he has acquired from the mouth of the jury, though we may entertain some degree of doubt whether they have come to a right conclusion. Before we send the party down again, we ought to perceive, if not with moral certainty, at least with a degree of clearness approaching to it, that the jury have done wrong. . . . The question what is the intention of a man performing a certain act, is to be judged of, not by the judges of the land, but a jury. It is a question involving the consideration of fraud,

which upon all occasions has been said to be solely and peculiarly for the consideration of a jury."

As to when a rule for a new trial will be granted, see *Gibson v. Muskett*, 3 Scott, N. B. 427; 4 Man. & Gr. 160; *Gibson v. Bruce*, 6 Scott, N. B. 309; 5 Man. & Gr. 399.

As to how far the declarations of the bankrupt are admissible to show the intention with which a transfer or payment have been made, see *Phillips v. Eamer*, 1 Esp. 355; *Lees v. Martin*, 1 M. & Rob. 210; *Ridley v. Gyde*, 9 Bing. 349; *Smith v. Cramer*, 1 Bing. N. C. 585; *Rouch v. Great Western Railway*, 1 Q. B. 51.

It seems that fraudulent preference may be impeached under a fiat on a bankrupt's own petition if there were a sufficient creditor's debt at the time of such fraudulent preference (*Ex parte Norton*, 1 De Gex, 529), and it seems they might be impeached as voidable, even without the circumstance of there being such a creditor, but whether as acts of bankruptcy seems doubtful, both previously and subsequent to the passing of 12 & 13 Vict. c. 106. See *Ib.*, ss. 93, 101; *Stevenson v. Newnham*, 13 C. B. 301.

A *bonâ fide* purchaser from a person who has acquired goods or chattels by means of a fraudulent preference will acquire an indefeasible title to them. "Acts of fraudulent preference," observes *Parke, B.*, "cannot be valid against the assignees, if they choose

to avoid them; but they are not absolutely void. They are on the same footing as the obtaining goods by one person from another person by fraud or deceit, though in the case of fraudulent preferences they may be avoided, where the party obtaining them may be perfectly innocent. The right in the assignees to avoid such transactions is founded on the policy of the bankrupt law, which favours the equal division of the bankrupt's property. But we entirely agree with the learned Chief Justice and the Court of Common Pleas (see 10 C. B. 722), that the effect of this, as of ordinary frauds, is not absolutely to avoid the contract or transfer which has been caused by that fraud, but to render it voidable at the option of the party defrauded. The fraud only gives the right to rescind. In the first instance, the property passes in the subject-matter. An innocent purchaser from the fraudulent possessor may acquire an indefeasible title to it, though it is voidable between the original parties. This was decided in the recent case of *White v. Garden* (10 C. B. 919), and had been so before in *Parker v. Patrick* (5 T. R. 175); in 1 Sumner's Reports of Mr. Justice Story's Decisions, 309; and by Lord Kenyon, in *Wright v. Lames* (4 Esp. 82, 221); and *Campbell v. Fleming* (1 Ad. & E. 40; 3 N. & M. 843). It must be considered therefore as established that fraud only gives a right to avoid a contract

or purchase, that the property rests until avoided; and that all mesne dispositions to persons not parties to, or at least not cognizant of the fraud, are valid." *Stevenson v. Newnham*, 13 C. B. 302.

The effect of bankruptcy upon a fraudulent preference is not to put the goods in the same situation as if they were actually the goods of the bankrupt, so as to vest them at once by the bankruptcy in the assignees, independently of any election on their part other than their acceptance of the office of assignee, but by a transfer, which is a fraudulent preference, the property vests in the transferee, subject to be divested by the assignees, at their election, and the title of the transferee is perfect except so far as it is avoided by the assignees. *Newnham v. Stevenson*, 10 C. B. 713.

The doctrine of fraudulent preference is not applicable to the case of a trustee restoring, previous to his bankruptcy, the property of his *cestui que trust*. See *Sinclair v. Wilson*, 20 Beav. 324. There a trustee, with the consent of his *cestui que trust*, pledged, for the benefit of a firm of which he was partner, Madras government notes, held by him in trust. The notes were afterwards redeemed and delivered to the firm. Subsequently the firm, without the consent of the *cestui que trust*, pledged them for a similar purpose. The firm being insolvent and bankruptcy imminent, the

trustee redeemed the notes with the partnership assets, indorsed them to himself personally, and replaced them in his private chest. The firm became bankrupt. It was held by Sir J. Romilly, M. R., that there was no fraudulent preference. "It has been contended," said his Honour, "that assuming the bills to have been trust property, there was a fraudulent preference; but I think that if they were trust property, the principle does not apply, because a fraudulent preference must be made in favour of a creditor; and if I am right in the view I take of this case, the plaintiff was not a creditor of the firm, but was the owner of certain specific property in the possession of the firm, who had notice of the trust."

The sale of the whole of a trader's stock to a *bond fide* purchaser at a fair price is not an act of bankruptcy, even though the trader intended at the time to abscond with the money; for the trader receives an equivalent for his stock, which might be made available for the benefit of his creditors. *Baxter v. Pritchard*, 1 Ad. & Ell. 456; 8 N. & M. 688; *Rose v. Haycock*, 1 Ad. & Ell. 460 n.

Moreover it seems that a sale by a trader of his goods at prices considerably below their market value, is not of itself a fraudulent transfer within the 67th section of the Bankrupt Act, 12 & 13 Vict. c. 106. To render the transaction fraudulent within that Act, the seller must have intended by

such sale to defeat or delay his creditors, and the purchaser must have had reason to know that such was the object of the seller. See *Lee v. Hart*, 11 Exch. 880. There a trader from time to time, during several months, sold his goods to the defendant at prices from £40 to £50 per cent. less than he paid for them, and afterwards became bankrupt. It was held in the Exchequer Chamber that it was properly left to the jury (see 10 Exch. 555) to say whether the dealings between the defendant and the bankrupt were real sales by the bankrupt to the defendant, each endeavouring to make the best bargain he could for himself, and, if so, such sales were not acts of bankruptcy as fraudulent transfers. "The statute," said *Wightman*, J., delivering the judgment of the Court, "does not mention 'sales' as one of the fraudulent modes by which an act of bankruptcy may be committed; but a sale of goods at a low rate may be a fraudulent transfer, if the seller did not intend to sell the goods *bonâ fide* for the purpose of carrying on his business, but for the purpose of defeating or delaying his creditors, and the purchaser has reason to know that such is the object of the seller. That is the effect of Lord *Tenterden's* opinion in the case of *Cook v. Caldecott* (Moo. & M. 552), which was much relied upon by the Court of Queen's Bench in the case of *Baxter v. Pritchard* (1 Ad. & Ell. 456). Neither of these cases, nor the cases of *Gra-*

ham v. Chapman (12 C. B. 85) and *Young v. Waud* (8 Exch. 221), apply to a case like the present, where the bankrupt sold goods at various times to the defendant at very low rates for the purpose, as it would appear by the evidence, not of defeating or delaying his creditors, but of distributing the proceeds amongst them, and so enabling him to continue to carry on his business for some time longer. The sales were *bonâ fide* sales, though at less prices than the goods were worth; and it does not appear that at the time of any of the sales the bankrupt could have obtained better prices for ready money, which it seems to have been his object to procure." See also *Harwood v. Bartlett*, 8 Scott, 171; 6 Bing. N.S. 61; *Devas v. Venables*, 3 Bing. N.S. 400; *Cook v. Caldecott*, 1 M. & M. 522; *Ward v. Clarke*, ib. 499; *Cash v. Young*, 2 B. & C. 413; *Bishop v. Crawshaw*, 8 B. & C. 415; *Hill v. Farnell*, 9 B. & C. 45.

An assignment by a trader of goods with a view to obtain future advances is not necessarily, as a matter of law, an act of bankruptcy, though the *whole* of the trader's stock, present and future, be included in the conveyance. If, for instance, the conveyance be *bonâ fide* with a view to obtain advances for the purpose of carrying on the trade, it will not be an act of bankruptcy. *Bittlestone v. Cooke*, 6 Ell. & Bl. 296, 307; *Whitwell v. Thompson*, 1 Esp. 68. And the result will be the

same where the assignment is made to secure an antecedent debt, if when the advance was made there was an understanding that such assignment should be executed. *Hutton v. Cruttwell*, 1 Ell. & Bl. 15, 19. For in these and such like cases the assignor who thus pledges his property obtains an equivalent for it. And indeed a contrary decision would lay down a rule inconsistent with the modern course of mercantile usage; for, as observed by *Crompton, J.*, "all merchants now raise money by pledge of their property; in times of pressure they often must bring every available thing to pledge; and if they did so by pledging their whole property in separate parcels to different pledgees, the transaction would not be impeachable; it is difficult to see why the transaction should be invalid if all the property is included in one pledge to one person, if that be most convenient." *Bittlestone v. Cooke*, 6 Ell. & Bl. 311. The inadequacy of the advance as compared with the value of the property pledged, will not make the assignment fraudulent as a matter of law; and it will be valid provided it were not fraudulent in fact—that is to say, provided the money were raised by the trader not with the intent of delaying his creditors, but of meeting them. *Bittlestone v. Cooke*, 6 Ell. & Bl. 296, 307, 308, 309.

The principle however of the cases which have just been considered will not be applicable to

the case where an assignment is made by a trader to secure a surety to a composition deed, who has given acceptances for the amount under the composition deed, inasmuch as the trader does not receive an equivalent which he can deal with in carrying on his trade. See *Leake v. Young*, 5 Ell. & Bl. 955. There a composition deed was made between Leake a trader, of the first part, Bracebridge his surety, of the second part, and his creditors, of the third part, which after reciting that the creditors had agreed to accept a composition of 12s. in the pound, to be paid by four instalments, at the end of four, six, nine, and twelve months, in full satisfaction and payment of their "several debts," the first three of such instalments to be secured by bills drawn by Leake on Bracebridge, and accepted by him, the last by Leake's promissory note. The deed contained a covenant by the creditors not to sue Leake until default should be made in payment of the bills and notes, or some of them, and upon payment of the bills and notes at maturity, to grant a release. Before executing the deed, Bracebridge stipulated with Leake for a security to himself over all Leake's property. Waller, one of Leake's creditors, executed the deed and received the bills and notes. On its maturity the first were dishonoured. Waller immediately commenced an action against Leake for his whole debt, in which he ultimately obtained judgment.

Leake, under pressure from Bracebridge after the commencement of Waller's action and before he obtained judgment, assigned all his property to Bracebridge. This was *bonâ fide* in fulfilment of his promise to give Bracebridge security. Leake was declared a bankrupt on Waller's petition. It was held by the Court of Queen's Bench that the assignment to Bracebridge was an act of bankruptcy, it being an assignment of all the trader's property, and not being for such an equivalent as to make it not necessarily delay his creditors. "A transaction," said Lord Campbell, C. J., "whereby the property is conveyed to secure a surety against liabilities which he has incurred to the particular creditors who come in, and which surety can stop the trade at any moment, is not in our opinion a case where the bankrupt receives an equivalent which he can deal with in carrying on his trade, if he chooses, within the doctrine of *Rose v. Haycock* (1 Ad. & Ell. 460 n.) and *Baxter v. Pritchard* (1 Ad. & Ell. 456). The whole power is entirely taken out of the hands of the bankrupt, and his trade may be stopped at any moment at the will of the assignee, while he is to receive nothing; and no part of the pro-

perty or its proceeds is under his control, but the whole is in effect to be applied to secure a creditor, who is to pay instalments to the particular body of creditors who have come in and agreed to receive his acceptances. It seems impossible to us to treat such a transaction as one where the trader obtains an equivalent within the principle of the cases on which the plaintiff relies; and we therefore, on principle as well as on authority, give our opinion that the deed in question was an act of bankruptcy." See also *Ex parte Zwilchenbart*, 3 Mont. D. & D. 671; *Re Marshall*, 1 De Gex, 273.

A *bonâ fide* agreement by a trader for a transfer of property for valuable consideration, even by way of security, amounting to an equitable assignment, will entitle the transferee to receive it, subject of course to any question which may be raised as to reputed ownership. See *Hunt v. Mortimer*, 10 B. & C. 44; *Hutchinson v. Heyworth*, 9 Ad. & Ell. 375; *Dangerfield v. Thomas*, ib. 292; *Belcher v. Oldfield*, 6 Bing. N. C. 102; *Crowfoot v. Gurney*, 9 Bing. 372; *Parnham v. Hurst*, 8 M. & W. 743; *Walker v. Rostron*, 9 M. & W. 411.

CROFT v. DAY.

Rolls, December 18th, 1843.

[REPORTED 7 BEAV. 232.]

TRADE MARKS.]—*A blacking manufactory had long been carried on under the firm of Day and Martin, at 97, High Holborn. The executors of the survivor continued the business under the same name. A person of the name of Day having obtained the authority of one Martin to use his name, set up the same trade at 90½, Holborn Hill, and sold blacking as of the manufacture of Day and Martin, 90½, Holborn Hill, in bottles and with labels having a general resemblance to those of the original form. He was restrained by injunction.*

Principles on which Courts of Equity interfere to prevent the use of trade-marks.

This was a motion on behalf of the executors of Mr. Day, the well-known blacking maker, to restrain the defendant, his nephew, from selling blacking manufactured by him, in bottles having affixed thereto labels, being copies or fac-similes or imitations, with colourable variations only, of those used by the firm of Day and Martin, or any labels which should represent, or have the appearance of representing, the said firm of Day and Martin, as manufacturers of the composition or blacking described in such labels, and from using trade cards of the same description.

It appeared from the case of the plaintiffs, that in 1801, Charles Day and Benjamin Martin entered into partnership as blacking manufacturers, for the term of twenty-one years, and carried on the business at 97, High Holborn. In 1808, Martin transferred his interest to Day, who was to be at liberty to use Martin's name for the remainder of the twenty-one years. This term was afterwards extended for twenty-five years, from the year 1820, determinable on

the death of Martin, and they agreed (but how did not appear) to be partners for that period.

Martin died in 1834, and Day died in 1836, and the business was carried on in the names of Day and Martin by Day's executors. The defendant Day, the testator's nephew, had recently set up as a blacking maker at No. 90½, Holborn Hill, and had sold blacking in similar bottles and with similar labels (with some variations) to those which had heretofore been used by Day and Martin, and to those now used by the executors of Day. The variation was thus described in the affidavit:—"Saith, that the name of the article sold as being real Japan blacking, made by Day and Martin, and the description and directions for the use of the said article, and the price and signature of the names Day and Martin, contained in the labels of the defendant, are in the same precise words, and (with very trifling and unimportant variations) are in the same character and description of type as the name of the article to be sold, and the description, and directions for use, and the price, and the signature of the said firm in the label used by the firm of Day and Martin as aforesaid; and the only difference in the labels is, that the defendant has substituted the royal arms, in the centre of the label, for the representation or drawing of the manufactory of the firm contained on the labels of the firm, and has substituted in the label the figures and words 90½, Holborn Hill, for the figures and words 97, High Holborn, contained in the label of the firm, and has omitted to insert in the figures 90½ the names Day and Martin, in the manner in which those words or names are inserted by the firm in their said figures 97."

The defendant by his affidavit stated, that the carts of the plaintiffs now bore the names of Charles Day and Richard, and no Benjamin, Martin. That previously to his, the defendant's, vending or offering for sale any blacking, he applied to an intimate acquaintance of his of the name of Martin, to join him in the manufacture and sale thereof, and obtained permission to use his name in conjunction with his own as manufacturers and vendors of blacking, and that he, the defendant, was now in treaty, and only waiting the result of this suit, finally to settle the terms of a partnership with Mr. Martin for carrying on the said business of blacking manufacturers.

Mr. Tinney, Mr. Purvis, and Mr. Toller, in support of the motion, argued that the defendant was intentionally practising a fraud

upon the plaintiffs, and a deception on the public; and that whatever might be his right to manufacture and sell blacking in his own name, still he had no right or authority to assume the additional name of Martin and use labels, etc., whose general character was so similar to that which the plaintiffs and the testator had long been in the habit of using, as to induce purchasers to believe that the article sold by the defendant was manufactured by and purchased from the plaintiffs.

Mr. Turner and Mr. Mylne, *contrà*, contended that the defendant had an undoubted right to affix his own name to his own manufacture, and that he had authority to add that of Mr. Martin, with whom he was in treaty for a partnership. That there was a marked difference between the labels, and as to those points in which there was a resemblance, they had long been adopted by the trade in general.

That the plaintiffs had practised a deception on the public, by representing the manufacture to be that of Day and Martin, while no person of those names was concerned therein; that consequently the plaintiffs came before the Court under circumstances to disentitle them to its assistance. *Knott v. Morgan* (2 Keen, 313) and *Perry v. Truefitt* (6 Beav. 66) were referred to.

Lord LANGDALE, M.R. (without hearing a reply).

What is proper to be done in cases of this kind must more or less depend upon the circumstances which attend them.

There are cases, like that of the London Conveyance Company, in which the injunction is granted at once; there are cases, like that of the Mexican Balm, in which the injunction is refused until the plaintiff has established his right at law. In short, in such cases there must be a great variety of circumstances; and the Court must deal with each case according to the nature of its peculiar circumstances.

The accusation which is made against this defendant is this: that he is selling goods under forms and symbols of such a nature and character as will induce the public to believe that he is selling the goods which are manufactured at the manufactory which belonged to the testator in this cause. It has been correctly said that the principle in these cases is this,—that *no man has a right to sell his own goods as the goods of another*. You may express the same principle in a different form, and say that *no man has a right to dress himself in colours, or adopt and bear symbols, to which he has*

no peculiar or exclusive right, and thereby personate another person, for the purpose of inducing the public to suppose, either that he is that other person, or that he is connected with and selling the manufacture of such other person, while he is really selling his own.

It is perfectly manifest, that to do these things is to commit a fraud, and a very gross fraud. I stated, upon a former occasion, that, in my opinion, the right which any person may have to the protection of this Court, does not depend upon any exclusive right which he may be supposed to have to a particular name or to a particular form of words. His right is to be protected against fraud, and fraud may be practised against him by means of a name, though the person practising it may have a perfect right to use that name, provided he does not accompany the use of it with such other circumstances as to effect a fraud upon others.

It is perfectly manifest that two things are required for the accomplishment of a fraud such as is here contemplated. First, there must be such a general resemblance of the forms, words, symbols, and accompaniments as to mislead the public. And secondly, a sufficiently distinctive individuality must be preserved, so as to procure for the person himself the benefit of the deceptions which the general resemblance is calculated to produce. To have a copy of the thing would not do, for though it might mislead the public in one respect, it would lead them back to the place where they were to get the genuine article, an imitation of which is improperly sought to be sold. For the accomplishment of such a fraud it is necessary, in the first instance, to mislead the public, and in the next place, to secure a benefit to the party practising the deception, by preserving his own individuality.

There are many distinctions even more than have been stated, between these two labels. It is truly said, that if any one takes upon himself to study these two labels, he will find several marks of distinction.

On the other hand, the colours are of the same nature, the labels are exactly of the same size, the letters are arranged precisely in the same mode, and the very same name appears on the face of the jars or bottles in which the blacking is put. It appears, therefore, to me, that there is quite sufficient to mislead the ordinary run of persons, and that the object of the defendant is, to persuade the public that this new establishment is, in some way or other, connected with the old firm or manufacturer, and at the same time to get purchasers to go to 90½, Holborn Hill, and not to 97, High

Holborn. I think what has been done here is quite calculated to effect that purpose, and the defendant must be restrained.

My decision does not depend on any peculiar or exclusive right the plaintiffs have to use the names Day and Martin, but upon the fact of the defendant using those names in connection with certain circumstances, and in a manner calculated to mislead the public, and to enable the defendant to obtain, at the expense of Day's estate, a benefit for himself, to which he is not, in fair and honest dealing, entitled. Such being my opinion, I must grant the injunction, restraining the defendant from carrying on that deception. He has a right to carry on the business of a blacking manufacturer honestly and fairly; he has a right to the use of his own name; I will not do anything to debar him from the use of that, or any other name calculated to benefit him in an honest way; but I must prevent him from using it in such a way as to deceive and defraud the public, and obtain for himself, at the expense of the plaintiffs, an undue and improper advantage.

The form of the injunction was discussed, when—

The Master of the Rolls, after stating that he was inclined to rely on the terms of the injunction in *Knott v. Morgan*, as that case had been the subject of appeal, said he would himself settle the terms of the injunction.

By the terms of the injunction, the defendant, his servants, etc., were restrained from selling, or exposing for sale, or procuring to be sold, any composition or blacking described as or purporting to be blacking manufactured by Day and Martin, in bottles having affixed thereto such labels as in the complainant's bill mentioned, or any other labels so contrived or expressed as, by colourable imitation or otherwise, to represent the composition or blacking sold by the defendant, to be the same as the composition or blacking manufactured and sold by John Weston (the manager), for the benefit of the estate of Charles Day, the testator; and from using trade cards, so contrived or expressed as to represent that any composition or blacking sold or proposed to be sold by the defendant, is the same as the composition or blacking manufactured or sold by John Weston.

The principle upon which courts of justice ordinarily interpose, in cases where one man uses the trade-mark of another, appears to be this, *that no one has a right to sell his own goods as the goods of another*. "You may," says Lord Langdale, M.B., in *Croft v. Day*, "express the same principle in a different form, and say that no man has a right to dress himself in colours, or adopt and bear symbols to which he has no peculiar or exclusive right, and thereby personate another person, for the purpose of inducing the public to suppose either that he is that other person or that he is connected with and selling the manufacture of such other person, while he is really selling his own. It is perfectly manifest, that to do these things is to commit a fraud, and a very gross fraud." *Ante*, p. 484. See also *Holloway v. Holloway*, 13 Beav. 209; *Ransome v. Bentall*, 3 L. J. (Ch.) 161 (N. S.).

In the case, however, of *Milington v. Fox*, 3 My. & Cr. 338, Lord Cottenham, C., held that a person may acquire a title to a particular trade-mark, and that the Court of Chancery, looking upon the use of it by another as an invasion of the rights of property, will grant an injunction to restrain such use, even although there may have been no fraudulent intention on the part of the defendant. In the case of *Milington v. Fox* (3 My. & Cr. 338) an injunction was granted to restrain the defendant from using as marks on steel, manufactured

by him, the words "Crowley," or "Crowley Middleton," although he was not aware that they were trade-marks, and believed that they were merely technical terms. "Having come to the conclusion," said Lord Cottenham, C., "that there was sufficient in the case to show that the plaintiffs had a title to the marks in question, they undoubtedly had a right to the assistance of a court of equity to enforce that title. At the same time the case is very different from the cases of this kind which usually occur, where there has been a fraudulent use by one person of the trade-marks or names used by another trader. I see no reason to believe that there has in this case been a fraudulent use of the plaintiffs' marks. It is positively denied by the answer; and there is no evidence to show that the defendants were even aware of the existence of the plaintiffs, as a company manufacturing steel; for although there is no evidence to show that the terms 'Crowley' and 'Crowley Middleton' were technical terms, yet there is sufficient to show that they were very generally used, in conversation at least, as descriptive of particular qualities of steel. In short, it does not appear to me that there was any fraudulent intention in the use of the marks. That circumstance, however, does not deprive the plaintiffs of the right to the exclusive use of those names; and therefore I stated that the case is so made out as to entitle the plaintiffs to

have the injunction made perpetual."

In examining the cases at law upon the subject of trade-marks, it will be found that the mere use by a person of a mark similar to that of another will not give the latter a right of action, for it must be shown that it was used with the fraudulent intention of passing off the goods of the defendant as those of the plaintiff.

The action in such cases is in the nature of an action for deceit; and it is laid down in Com. Dig. tit. "*Action upon the case for Deceit*," (F. 3.), that "the declaration regularly ought to charge that the defendant was *sciens* of the matter by which he was deceived; and that he did it *falsè et fraudulenter*." Per *Cresswell, J.*, 4 Man. & Gr. 385.

The earliest case upon this subject at law is cited in *Southern v. How*, Pop. 144, by *Doderidge, J.*, who said that "22 Eliz. an action upon the case was brought in the Common Pleas by a clothier, that whereas he had gained great reputation for his making of his cloth, by reason whereof he had great utterance to his benefit and profit, and that he used to set his mark to his cloth, whereby it should be known to be his cloth, and another clothier perceiving it, used the same mark to his ill-made cloth on purpose to deceive him, and it was resolved the action did well lie." Poph. 144. The more recent cases at law are *Blofeld v. Payne*, 4 B. & Ad. 410; *Sykes v. Sykes*, 3 B. & C. 541; 5 D. & B. 292; *Morison*

v. Salmon, 2 M. & G. 385; 2 Scott, N. R. 449; *Singleton v. Bolton*, 3 Dougl. 293; *Crawshay v. Thompson*, 4 M. & G. 357; 5 Scott, N. R. 562; in all of which the proof of a fraudulent intention, or attempt to deceive others, on the part of the defendant has been either held or assumed to be essential to the plaintiff's success.

It has even been held at law, that notice of the resemblance of the mark given by the plaintiff to the defendants, will not, in the absence of proof of any intention to imitate it on the part of the defendants, give the plaintiff any cause of action. *Crawshay v. Thompson*, 4 Man. & Gr. 357.

It is not, however, necessary to show that the persons to whom articles are sold are deceived by the trade-mark they bear, if through their means the public generally may afterwards be induced to purchase such articles, believing them to be manufactured by the person whose trade-mark has been adopted or imitated. Thus although persons who have adopted the trade-marks of another do not themselves sell their own goods as of his manufacture, yet if they sell them to retail dealers, for the express purpose of being resold as his goods, the fraudulent intention will be sufficiently shown. *Sykes v. Sykes*, 3 B. & C. 541.

And where it appears that the defendant has fraudulently used the plaintiff's trade-marks, the latter will at law be entitled to some damages, although no specific damage be proved, because it

is "to a certain extent an injury to his right." *Blafeld v. Payne*, 4 B. & Ad. 410, 411.

It will be observed that when a person uses the trade-mark of another, relief may sometimes be had by injunction in equity, when damages could not be obtained in an action on the case at law, inasmuch as it is necessary at law to charge in the declaration that the defendant used the trade-marks of another *scienter*, knowingly, for the purpose of deceiving others; where therefore that allegation cannot be made or proved, resort should be had to a court of equity, as it is a sufficient ground for relief there, if the defendant actually does deceive others by the use of another's trade-mark, whatever may be his own intention. This distinction was noticed by Sir *W. Page Wood*, V. C., in the recent case of *Welch v. Knott*, 4 K. & J. 747, 751, where his Honour, although he refused the injunction upon other grounds, made the following important remarks, "That the defendant would not be entitled to use the plaintiff's bottles in such a manner as, in *fact*, to mislead the public, although there might be no intention on his part to mislead, is clear. In *Millington v. Fox*, (3 My. & Cr. 338, 352), Lord *Cottenham* felt satisfied that in using the plaintiffs' trade-marks, the defendants had no intention to mislead the public; yet inasmuch as the public were in fact misled, he held that the plaintiffs were entitled to a perpetual injunction. It was not sufficient for

the defendants to say that they used the marks in ignorance of their being the plaintiffs' trade-marks. How far that doctrine is capable of being reconciled with cases at law in which the *scienter* has been held to be essential, in order to enable the plaintiff to recover, it is not material to consider. In this Court the rule is clear, as laid down in *Millington v. Fox*. And in accordance with that rule, I held in *Bass's case*, that no one was at liberty to sell ale not made by Bass in bottles marked with his label, so as to mislead the public."

There does not, however, appear to be any inconsistency between the cases at law and the cases in equity, when we consider the different nature of the remedies usually administered in each. Indeed it seems only consistent with natural justice and common sense, that a person should not be liable to pay damages for having unwittingly, and therefore without fraudulent intention, used the trade-mark of another; but at the same time he would, with equal justice, be restrained in equity from making a further use of it, inasmuch as, after notice, (assuming the title of the plaintiff either to be clear or capable of being established,) it could not be said that any further use of the trade-mark by the defendant could be otherwise than fraudulent.

Lord *Cottenham's* expressions in *Millington v. Fox* have been often criticized, but after a careful examination of the cases in which they

are noticed it will be found that the learned judges who comment upon them mean, if not quite, nearly the same thing, although they express themselves in a different manner. Thus in a recent case it has been laid down, that although there is no property whatever in the use of a trade-mark, nevertheless a person may acquire a right of using a particular mark for articles he has manufactured, so that he may be able to prevent any other person from using it, because the mark denotes that articles so marked were manufactured by a certain person; and no one else can have a right to put the same mark on his goods, and thus to represent them to have been manufactured by the person who originally used that particular mark. *The Collins Co. v. Brown*, 8 K. & J. 426, per *Wood*, V. C.

The question has been raised by a person who, as tenant of particular works, had derived the benefit of using the distinguishing mark employed for the purpose of marking the goods made there, whether on quitting the premises and establishing a similar manufactory elsewhere after his lease of the previous works had expired, he had an exclusive right to use the mark which he had obtained the right to use, or at least the benefit of using as tenant of those works. This point was discussed in *Motley v. Downman*, 3 My. & Cr. 1, and Lord *Cottenham*, saying it was one of considerable nicety, and had never been mooted before, refused to interfere by in-

junction until the legal right had been determined in an action.

The Court of Chancery when it interferes in cases of trade-marks, as observed by Lord *Cottenham*, C., exercises a jurisdiction over legal rights, and although sometimes, in very strong cases, that is to say, where the legal right is clear, as in the principal case and as in case of the London Conveyance Company (*Knott v. Morgan*, 2 Keen, 213; and see *Franks v. Weaver*, 10 Beav. 296; *Shrimpton v. Laight*, 18 Beav. 164; *Millington v. Fox*, 3 My. & Cr. 388), alluded to by Lord *Langdale*, it interferes by injunction, yet in a general way it puts the party upon asserting his right by trying it in an action at law. If it does not do that, it permits the plaintiff notwithstanding the suit in equity, to bring an action. In both cases, the Court is only acting in aid of, and is ancillary to the legal right. And Lord *Cottenham* even said, that he could hardly conceive a case in which the Court would at once interfere by injunction and prevent a defendant from disputing the plaintiff's legal title. (*Motley v. Downman*, 3 My. & Cr. 14; see also *Blanchard v. Hill*, 2 Atk. 485, 487; *Hogg v. Kirby*, 8 Ves. 215, 226; *Perry v. Truefitt*, 6 Beav. 66; *Rodgers v. Nowill*, 6 Hare, 325, 331; *Purser v. Brain*, 17 L. J. 141, Ch.; *Spottiswoode v. Clarke*, 2 Ph. 154, 156; *Welch v. Knott*, 4 K. & J. 747; *sed vide Hine v. Lart*, 10 Jur. 106.) Until that is tried, the Court may direct the defendant to keep an account

of sales. *Spottiswoode v. Clarke*, 2 Ph. 154, 158.

The trade-mark of an alien friend will be protected in the same manner as that of a subject of this country (*Farina v. Silverlock*, 1 K. & J. 509; 4 K. & J. 747; *The Collins Company v. Reeves*, 6 W.R. (V.C.S.), 717; 28 L. J. 56 Ch.; *The Collins Company v. Walker*, 7 W. R. 222 (V.C.K.)), and it is immaterial that the goods so marked are not sold in this country. *Ib.*; and see *The Collins Company v. Brown*, 3 K. & J. 423; *The Collins Company v. Cowen*, *ib.* 428.

The law is the same in the United States, where it has been held that a subject of this country is entitled to an injunction against a native of the United States to prevent the use of his trade-mark, but it seems to have been assumed there by counsel that in England the trade-marks of foreigners are not protected; and it was therefore argued that the trade-marks of Englishmen were not entitled to protection in the United States, however both the Chancellor of New York and the Court of Appeal decided in favour of the plaintiff, and *Lott*, Senator, in giving judgment, made the following observations, "I trust our Courts will never recognize a different rule of right and justice between any class of suitors; that their records will never show that fraud by a citizen is sanctioned, because it is practised on a foreigner in the prosecution of a legitimate business within our ju-

risdiction, or that a suitor is denied the ordinary remedy to protect him in the enjoyment of his rights, because he is a 'foreigner.' The honour of our country and the character of its jurisprudence forbid that justice and equity shall ever be administered on such narrow, proscriptive, and inequitable principles. Every dictate of enlightened wisdom requires that a foreigner, especially in a commercial country, shall be entitled to the same protection of his rights as a citizen. If other nations are chargeable with wrong and injustice in this respect, it is certainly no reason why we should follow their example. Retaliation in a course of injustice, is not a salutary principle to enforce in the administration of justice. But I do not think that England is amenable to the charge, to the extent suggested by the counsel for the appellant. All that was decided in *Delondre v. Shaw*, 2 Sim. 237, cited by him in support of it, is that 'the Court will not protect the copyright of a foreigner.' The Vice-Chancellor however expressly recognizes the rule that an injunction will be granted to restrain the fraudulent sale of a spurious article, but he says that he could not intend a fraud where none was alleged." *Taylor v. Carpenter*, 2 Sandf. Ch. Rep. 608, 614; *Coats v. Holbrook*, *ib.* 586.

The instances in which the Courts have interposed in cases of the violation of trade-marks are various; such as the user of the same or a similar name or ad-

dress, stamp, label, or packets for goods; or in the case of a book or periodical, the user of a similar title-page or wrapper. *Millington v. Fox*, 3 My. & Cr. 338; *Franks v. Weaver*, 10 Beav. 297; *Holloway v. Holloway*, 13 Beav. 299; *Shrimpton v. Laight*, 18 Beav. 164; *Spottiswoode v. Clarke*, 2 Ph. 154.

In *Knott v. Morgan*, 2 Keen, 213, an injunction was granted to restrain the defendant from running an omnibus having upon it such names, words, and devices as to form a colourable imitation of the words, names and devices on the omnibuses of the plaintiffs.

Upon the same principle a defendant will be restrained from publishing a work, or carrying on a trade, under a fraudulent representation that such work or trade is that of the plaintiff. Thus in *Hogg v. Kirby* (8 Ves. 215), the defendant was restrained from publishing a magazine, which it was evident from its title-page and wrapper he intended to represent to be a continuation of the plaintiff's magazine in numbers. So also where the proprietor of a newspaper bequeathed to his widow the benefit of that trade, subject to a trust for maintaining and educating her family, and she having formed an attachment for the foreman, assisted him in publishing a paper with the same name, an injunction was granted upon the application of the executors. *Keene v. Harris*, 17 Ves. 342 cited; see also *Lewis v. Langdon*, 7 Sim. 421. An injunction was also obtained to

restrain the publication of poems represented to be the work of Lord Byron. *Lord Byron v. Johnston* 2 Mer. 29. In the case of *Crutwell v. Lye*, 17 Ves. 835, an injunction was refused to restrain a person who had sold a trade with the goodwill from setting up a similar trade, there being no express covenant nor *fraud by representing it as a continuation of the old trade*, nor any conduct on the part of the defendant which might create a confidence in others that he would not trade again. See Eden on Injunct. 313, 314.

In cases of alleged colourable imitations of trade-marks, the Court, as is laid down in the principal case, has not to consider whether manufacturers could distinguish between them, but whether the ordinary run of persons, who may be more easily misled, would probably be deceived. *Shrimpton v. Laight*, 18 Beav. 164; *Perry v. Truefitt*, 72; *Holloway v. Holloway*, 13 Beav. 209. In *Franks v. Weaver*, 10 Beav. 297, the plaintiff had invented and sold a medicine under his own name. The defendant had also made and sold a similar medicine, and on his labels he used the plaintiff's name and certain certificates given of the efficacy of the plaintiff's medicine, in such an ingenious manner as *prima facie*, though not in fact, to appropriate and apply them to his own medicine. It was held by Lord Langdale, M.R., that although there were other differences in the mode of selling, the proceeding was wrongful, and the plaintiff was

entitled to an injunction. "It is very true," said his Lordship, "that if any one compares the plaintiff's wrappers with the labels used by the defendant, he will find a very considerable difference,—the difference is even striking; but it is not by similarity of form or the mode of printing that we can get at any result in this case. Again, if anybody critically reads the advertisement of the defendant, he will find that he does not, in direct terms, apply the encomiums given to the plaintiff's preparation to his own; he does not even say that the preparation he is selling is made by the plaintiff; and yet, for all that, nobody can look at all these things without observing that the name and the testimonials of the plaintiff are so craftily employed, as to be well calculated to produce, in the minds of ordinary readers, the impression that the mixture or solution prepared and sold by the defendant is the same as that to which these testimonials are applicable: that is to say, the mixture or solution of the plaintiff." See also *Day v. Binning*, 1 C. P. Coop. Rep. 489; *Motley v. Downman*, 3 My. & Cr. 1, 15.

As was laid down in the principal case, the Court of Chancery will not prevent a person from selling an article in his own name, although that name is one in which another has long been selling a similar article (see *Burgess v. Burgess*, 3 De Gex, Mac. & G. 896); but "where a person is selling goods under a particular name, and another person not hav-

ing that name is using it, it may be presumed that he so uses it to represent the goods sold by himself as the goods of the person whose name he uses. It is a question of evidence in each case whether there is a false representation or not." *Ib.* 905, per *Turner*, L. J. This is well illustrated in the principal case, where the injunction was granted, not because the defendant carried on the trade of blacking manufacturer in his own name, but because he sold the blacking, when manufactured, in bottles and with labels so contrived as by colourable imitation to represent the blacking he manufactured to be the same as that manufactured by another firm.

Where one company assumed a name somewhat similar to the name of another company, but it did not appear that the first company was likely to suffer any injury thereby, the Court refused to grant an injunction, leaving the plaintiffs to bring their action at law. *London and Provincial Law Assurance Society v. London and Provincial Joint Stock Life Assurance Company*, 11 Jur. 938.

A person cannot obtain damages at law against another person for having assumed the same name or style for the purpose of carrying on business, unless he shows that he has himself actually carried on business under such name or style. See *Lawson v. The Bank of London*, 18 C. B. 84. There the declaration stated that the plaintiff had established a bank in London, called 'The Bank of London,' and was

the first person who had established a bank by or under that name, and had established the said bank at great expense, and caused the name to be published and affixed on the offices of the said bank, so that the same might be seen and known by the public, and had caused prospectuses by the said bank to be printed and circulated, with the said name and title of 'The Bank of London' thereon; and the said bank was then commonly known by the name of, and was the only bank named and styled 'The Bank of London,' whereby the plaintiff had acquired and was acquiring great gains and profits. It then proceeded to allege that the defendants, intending to injure the plaintiff in his said bank and the said business of his said bank, afterwards and while his said bank was the only bank named or styled 'The Bank of London,' wrongfully and fraudulently established a certain other bank in London under the name, style, and title of 'The Bank of London,' *in imitation of, and as representing the said Bank of London of the plaintiff*, and wrongfully and fraudulently transacted business at the said bank so established by the defendants under the said name, and under false colour and pretence that the same was the bank established by the plaintiff; and thereby the plaintiff had been prevented from carrying on his business at the said bank so established by him so fully and extensively as he would otherwise have done, and had been deprived of profits, and

that by means of the premises divers persons were induced to believe and did believe that the bank so established by the defendants was the bank called 'The Bank of London' established by the plaintiff. It was held by the Court of Common Pleas that the declaration disclosed no cause of action, it not being averred that the plaintiff had ever carried on the business of a banker. "It does not appear," said *Jervis, C. J.*, "that the plaintiff has ever carried on the business of banking, or that he had a single customer, or that he was in a position to be damnified by the acts of the defendants. I therefore think enough has not been alleged in this declaration to show that the plaintiff has sustained any injury, and consequently the action will not lie."

The question has been raised, but not determined, how far an action will lie against a corporation for carrying on a business under the same name as and for the purpose of making it to be believed that it was the business of another person; but *Willes, J.*, in *Lawson v. The Bank of London*, 18 C. B., 95, observed that he was not prepared to say that the corporation would not be liable if the cause of complaint were properly alleged. For as the corporation would have capacity to do the act, it might possibly be responsible for its consequences.

It must not be supposed, from what has been said, that a person can obtain an exclusive right in a subject not protected by patent, so as to

prevent the sale thereof by another person under the same title, if he does not thereby endeavour to sell his own goods as the goods of another. Thus in *Canham v. Jones*, 2 V. & B. 218, where the plaintiff, who was the legatee of a secret or recipe for preparing a medicine called 'Velno's Vegetable Syrup,' filed a bill against the defendant to restrain him from selling a spurious preparation under the name of 'Velno's Vegetable Syrup,' stated by him to be the same medicine in composition and quality as that made by the plaintiff, Sir Thomas Plumer, V. C., allowed a demurrer to the bill. "If," said his Honour, "this claim of monopoly can be maintained without any limitation of time, it is a much better right than that of a patentee: but the violation of right with which the defendant is charged does not fall within the cases in which the Court has restrained a fraudulent attempt by one man to invade another's property; to appropriate the benefit of a valuable interest in the nature of a goodwill, consisting in the character of his trade or production, established by individual merit; the other representing himself to be the same person, and his trade or production the same, as in *Hogg v. Kirby* (8 Ves. 215), combining imposition on the public with injury to the individual. This is not that sort of case. The observation is correct, that the bill, stating the defendant's medicine to be spurious, asserts it not to be the same as the plaintiffs'. The defendant does not hold himself

out as the representative of Swainson, setting up a right in that character to the medicine purchased by him, but merely represents that he sells *not the plaintiff's medicine, but one of as good a quality*. He is at perfect liberty to do so."

A court of equity will however restrain the use of a secret, as, for instance, in the compounding of a medicine not being the subject of a patent, and restrain the sale thereof by a person who has acquired a knowledge of the secret *by means of a violation of a contract or a breach of trust and confidence* (*Yovatt v. Winyard*, 1 J. & W. 394; *Morison v. Moat*, 9 Hare, 241; see also *Williams v. Williams*, 8 Mer. 157); and the same relief will be granted against a party to whom it has been divulged by another who acquired it by means of a breach of faith or contract. *Green v. Folgham*, 1 S. & S. 398; *Morison v. Moat*, 9 Hare, 241, 263; and see *Tipping v. Clarke*, 2 Hare, 393; *Prince Albert v. Strange*, 2 De G. & Sm. 652; 1 Mac. & G. 25.

Where a person has made false representations to the public with regard to the article which he sells, courts of equity will not in the first instance interfere on his behalf by injunction, to protect him in the enjoyment of a trade-mark, but will leave him to take proceedings at law. See *Pidding v. How*, 8 Sim. 477: there the plaintiff had made a new sort of mixed tea, and sold it under the name of 'Howqua's Mixture.' Sir L. Shadwell, V.C., refused to restrain the de-

defendant from selling tea under the same name until the plaintiff had established his title at law, upon the ground that the plaintiff had made false statements to the public, as to the teas of which his mixture was composed and as to the mode in which they were procured. "It is a clear rule," said his Honour, "laid down by courts of equity, not to extend their protection to persons whose cases are not founded in truth. And as the plaintiff in this case had thought fit to mix up that which *may* be true with that which *is* false, in introducing his tea to the public, my opinion is, that, unless he establish his title at law, the Court cannot interfere on his behalf." See also *Perry v. Truefitt*, 6 Beav. 66; and *Flavel v. Harrison*, 10 Hare, 467, 472, in which case the plaintiff had falsely assumed to describe the article in respect of which he sought the assistance of the Court, as being patented. *Hogg v. Kirby*, 8 Ves. 246.

It has been held, however, that the vendor of quack medicines, as in the case of Holloway's pills, is entitled to be protected in the use of his trade-mark, although in puffing off his articles he may use language not altogether consistent with truth, as, for instance, that his pills will cure all the diseases in the world, that they have been recommended by the faculty, and that the vendor is a professor. See also *Perry v. Truefitt*, 6 Beav. 66; *Gout v. Aleplogu*, ib. 69 n.; *Holloway v. Holloway*, 13 Beav. 209.

The Court of Chancery, moreover, will only interfere in cases of

mischief being done to property by the fraudulent misuse of the name of another, by which his profits are diminished; it will not do so, although a person's name may be made use of in order to deceive the public, even if it be in a manner calculated to do him injury. Thus in *Clark v. Freeman*, 11 Beav. 112, Lord Langdale, M.R., refused to grant an injunction to prevent a chemist from selling a quack medicine, under a false and colourable representation that it was the medicine of the plaintiff, Sir James Clark, an eminent physician. "I am very much inclined," said his Honour, "to think this is an attempt to impute to a gentleman of high position and character, that he is somehow concerned in vending quack medicines; then, no doubt it is a serious injury to him in the way of slander; and it may also be an injury to the public, who may be induced, by reason of the sanction of the plaintiff's name, to adopt as a remedy a medicine which may be in the highest degree prejudicial. This, I conceive, would be in the nature of a public offence. Now if this Court had jurisdiction in cases of this kind, you must first establish the offence at law. A judge sitting here cannot decide it. If after that has been done, you find that an injury is thereby done to the plaintiff's property, or to his means of subsistence or of gaining a livelihood, I will not say that in such a case the Court might not interfere by injunction. . . . If Sir James had been in the habit of manufacturing and selling

pills, it would be very like the other cases in which the Court has interfered *for the protection of property*."

A person manufacturing trade-marks belonging to one person, in order to sell them to others for the purpose of their making *a fraudulent use of them*, will be restrained by injunction from so doing. Thus, in the case of the well-known manufacturer of Eau de Cologne, Johann Maria Farina, who was in the habit of having paper labels and wrappers pasted on and wrapped round his own manufactures, it was held that he might restrain a printer who had made and printed, and was in the habit of selling imitations of his labels to persons for the purpose of *using them fraudulently* to pass off other goods, as those of the plaintiff, though the printer himself made no such use of them, and notwithstanding the possibility that some labels so printed and sold might be purchased *bonâ fide* and for the purpose of being applied to articles of the plaintiff's own manufacture, and Sir *W. Page Wood*, V.C., in this case granted an injunction upon interlocutory motion (*Farina v. Silverlock*, 1 K. & J. 509). Lord *Cranworth*, C., however refused to restrain the printing and sale of the labels until the plaintiff, who alleged they were used for a fraudulent purpose, had established his case by an action at law, inasmuch as it was shown by the defendant, that in very many instances the same or similar labels might be sold for a legi-

timate purpose (*Farina v. Silverlock*, 6 De G. Mac. & G. 214). On the case being tried at law, the jury found a verdict for the plaintiff, and the full Court discharged a rule nisi for a new trial (*Farina v. Silverlock*, 6 W. R. 501, Q. B.), and thereupon a perpetual injunction was granted, and upon the defendant insisting on an adverse right after being made aware that the plaintiff had been defrauded through his agency, he was ordered to pay the costs of all the proceedings at law and in equity. *Farina v. Silverlock*, 4 K. & J., 650; see also S. C., 1 De G. & Jo. 434.

It seems, however, that an injunction would not be granted to restrain the engraving or sale of labels or seals used as trade-marks, where it has not been shown that they have been used for the purpose of selling a spurious article, inasmuch as the Court cannot intend a fraud where none is alleged. *Delondre v. Shaw*, 2 Sim. 237, 240.

A person may, it seems, in some cases lawfully procure and use the trade-mark of another. Thus, if a person buys an article from another without the usual trade mark, as for instance, without a label, or if the label were by some means or other worn out, he might employ any printer he might think fit to print or engrave for him a label which should be the exact counterpart of that used by the vendor, and it can be no ground of complaint by the vendor, that the person sells the article with something upon it to represent his trade-mark, though it is not a genuine trade-

mark. See *Farina v. Silverlock*, 1 K. & J. 520; 6 De G. Mac. & G. 219; and see *ib.* 6 W. R. 501 Q. B.).

On breach of an injunction against the use of a trade-mark, the defendant will be liable to be committed for contempt of Court, even although in the case of such breach by a firm all the partners are not before the Court (*Rodgers v. Nowill*, 3 De Gex, Mac. & G. 614), and in order to deprive the party who has obtained the injunction of the right to move for committal upon the breach of it, there must be a case made out almost amounting to such a licence to the party enjoined to do the act enjoined against, as would entitle him to maintain a bill against others for doing that act. In fact, the party enjoined against must, it seems, show such acquiescence as would be sufficient to create a new right in him." *Ib.* 619, per Turner, L.J.

As a general rule in these cases, the Court of Chancery will make the costs follow the result; because, however doubtful the title to a trade-mark may be, or however proper it may be to dispute it, it is but fair that the party who really has the right should be reimbursed, as far as giving him the costs of the suit can reimburse him. Per Lord Cottenham, C., in *Millington v. Fox*, 3 My. & Cr. 353. There is, however, another object which the Court must keep in view, namely, to repress unnecessary litigation, and to keep litigation within those bounds which are essential to enable the parties to vindicate and

establish their rights. *Ib.* Hence, if before the bill is filed, the defendant offers to concede everything which the plaintiff seeks, the plaintiff is not justified in filing a bill, or if he does the same after a bill has been filed, the plaintiff ought not to apply *ex parte* for an injunction, or if he has obtained an order for it, he should not draw up such order. *Ib.* 353, 354. If after an injunction has been obtained on motion to restrain the use of a trade-mark, the defendant offers to consent to a perpetual injunction and to pay the costs up to the time when the offer was made, all subsequent costs will be thrown on the plaintiff (*Millington v. Fox*, 3 My. & Cr. 338, 353), but if the defendant makes no offer to pay the costs, the plaintiff is entitled to bring on the cause to a hearing for his costs. *Burgess v. Hills*, 26 Beav. 244; 5 Jur. n.s. 232; *The Collins Company v. Walker*, 7 W. R. 222 (V.C.K.). In *Pierce v. Franks*, 15 L. J. (Ch.), 122; 10 Jur., 25, 26. The bill alleged that the defendant sold brushes, on which the trade-mark of the plaintiff was stamped, and prayed for an account and an injunction. The defendant by his answer stated, that he had sold such brushes on two occasions only, when he believed that he had sold them to agents of the plaintiff; that he had no intention to sell them without the leave or to the injury of the plaintiff; and that if the plaintiff had made any application to him, he would have undertaken never to stamp any more articles with the plaintiff's trade-

marks. The plaintiff set the cause down on the answer of the defendant, without entering into evidence; and, waiving the account, asked for a perpetual injunction. It was held by Sir J. L. Knight Bruce, V.C., that there had not been any unnecessary litigation on the part of the plaintiff, and that he was entitled to a perpetual injunction and the costs of the suit, except so far as they had been increased, if at all, by an allegation in the bill of certain marks being private marks. See also *Burgess v. Hatley*, 26 Beav. 249. As to costs where the plaintiff has been successful in an action at law, see *Rodgers v. Nowill*, 6 Hare, 325; *Farina v. Silverlock* 4 K. & J. 650.

It may be here mentioned that if a person without the licence of the patentee, places on a thing the mark or device of the patentee in imitation of, and with a view to imitate it, he will render himself liable to a penalty, under 5 & 6 Will. 4, c. 83 s. 6, and it will be no defence in an action for the penalty, that the invention was not a new manufacture, (*Myers v. Baker*, 3 Hurlst. & N. 802), the act however being of a highly penal character is construed strictly, and the effect is, that if a mark is put on innocently, without any fraudulent intention, or any view of imitating the mark of the patentee, no penalty will be incurred. *Ib.* 802, 812.

The printing and using of labels, being the trade-marks of another person, will not amount to forgery. See *Regina v. John Smith*, Dears.

& Bell, C. C. R. 566. There it appeared that one Borwick, the prosecutor, sold powders, called "Borwick's Baking Powders," and "Borwick's Egg Powders," which powders he invariably sold in packets wrapped up in printed papers. Smith procured 10,000 wrappers to be printed similar, with some exceptions, to Borwick's wrappers. In these wrappers Smith inclosed powders of his own which he sold for Borwick's powders; Smith was indicted for the forgery and uttering of these wrappers, and was convicted, the jury finding that the wrappers so far resembled Borwick's as to deceive persons of ordinary observation, and to make them to believe them to be Borwick's, and that they were procured and used by the prisoner with intent to defraud. It was held, however, by the Court of Criminal Appeal, that the conviction was wrong. "I agree," said *Willes, J.*, "in the definition of forgery at common law, that it is the forging of a false document to represent a genuine document. That does not apply here, and it is quite absurd to suppose that the prisoner was guilty of 10,000 forgeries as soon as he got these wrappers from the printer; and if he had distributed them over the whole earth, and done no more, he would have committed no offence. The fraud consists in putting inside the wrappers powder which is not genuine, and selling that. If the prisoner had had 100 genuine wrappers and 100 not genuine, and had put genuine powder into

the spurious wrappers, and spurious powder into the genuine wrappers, he would not have been guilty of forgery. This is not one of two different kinds of instruments which may be made the subject of forgery. It is not made the subject of forgery, simply by reason of the assertion of that which is false. In cases like the present

the remedy is well known: the prosecutor may, if he pleases, file a Bill in Equity to restrain the defendant from using the wrapper, or he may bring an action at law for damages, or he may indict him for obtaining money under false pretences; but it would be straining the law to hold that this was a forgery."

TARLING v. BAXTER.

Hil. Term, 7 & 8 Geo. IV. 1827.

[REPORTED 6 BARN. & CRESS. 360.]

SALE OF PERSONALTY.—PROPERTY IN AS DISTINGUISHED FROM POSSESSION.—WHEN IT PASSES TO PURCHASER.]—*A., on the 4th of January, agreed to sell to B. a stack of hay for the sum of £145., to be paid on the 4th of February, the same to be allowed to stand on A.'s premises until the 1st of May. B. stipulated that the hay should not be cut until it was paid for. Held, that this was a contract for an immediate and not a future sale; and that the property in the hay passed by it immediately to the vendee; and that the same having been subsequently destroyed by fire, the loss fell upon him.*

Assumpsit to recover back £145 paid by the plaintiff to the defendant's use. The declaration contained counts for money had and received, and the other common counts. Plea, general issue, with a notice of set-off for goods sold and delivered, and bargained and sold. At the trial, before *Abbott, C.J.*, at the London sittings after Hilary Term, 1826, a verdict was found for the plaintiff for £145, subject to the opinion of this Court on the following case:—

On the 4th of January, 1825, the plaintiff bought of the defendant a stack of hay belonging to the defendant, and then standing in a field belonging to the defendant's brother. The note, signed by the defendant and delivered to the plaintiff, was in these words: "I have this day agreed to sell James Tarling a stack of hay, standing in Canonbury Field, Islington, at the sum of one hundred and forty-five pounds, the same to be paid on the 4th day of February next, and to be allowed to stand on the premises until the 1st day of May next." And the following note was signed by the plaintiff, and delivered to the defendant: "I have this day

agreed to buy of Mr. John Baxter a stack of hay, standing in Canonbury Field, Islington, at the sum of £145, the same to be paid on the 4th day of February next, and to be allowed to stand on the premises until the first day of May next, the same hay not to be cut until paid for. January 4th, 1825." At the meeting at which the notes were signed, but after the signature thereof, the defendant said to the plaintiff, "You will particularly oblige me by giving me a bill for the amount of the hay." The plaintiff rather objected. The defendant's brother, S. Baxter, on the 8th of the same month of January, took a bill of exchange for £145 to the plaintiff, drawn upon him by the defendant, dated the 4th of January, 1825, payable one month after date, which the plaintiff accepted. The defendant afterwards indorsed it to George Baxter, and the plaintiff paid it to one Taylor, the holder, when it became due. The stack of hay remained on the same field entire until the 20th of January, 1825, when it was accidentally wholly consumed by fire, without any fault or neglect of either party.

A few days after the fire, the plaintiff applied to the defendant to know what he meant to do when the bill became due. The defendant said, "I have paid it away, and you must take it up to be sure; I have nothing to do with it; why did you not remove the hay?" The plaintiff said "he could not, because there was a memorandum 'that it should not be removed until the bill was paid.' Would you have suffered it to have been removed?" And the defendant said, "Certainly not." The defendant's set-off was for the price of the hay agreed to be sold as aforesaid. The question for the opinion of the Court was, whether the plaintiff, under the circumstances, was entitled to recover the sum of £145, or any part thereof.

Chitty for the plaintiff.—The loss in this case must fall upon the defendant. There is a difference between the two contracts: the one contains a stipulation not in the other, that the hay was not to be cut till paid for. Now if that be a material part of the contract, then there was no one sufficient contract in writing to satisfy the Statute of Frauds; but assuming that there was a complete contract of sale without the stipulation, and that the plaintiff thereby consented to waive a right which he otherwise would have had, still the property in the hay had not passed to the vendee, because this was a sale upon credit, and the vendee was not entitled to have possession of the goods until the credit expired; and, if so, the property did not vest in him until the credit expired.

Hobroyd, J.—In Comyn's Dig. tit. Agreement (B. 3), it is laid down, "that if a sale be of goods for such a price, and a day of payment limited, the contract will be good, and the property altered by the sale, though the money be not paid;" and R. 10 H. 7 8 a, 14 H. 8, 20 a, and Dyer, 30 a, are cited. And again, "If A. sell a horse to B., upon condition that he pay £20 at Christmas, and afterwards sell it to D., the sale to D. is void, though B. afterwards do not pay;" and Plowden's Com. 432 b. is cited, and the reason there given is, that A. at the time of the second contract had no interest in, nor property, nor possession of the horse, nor anything but a condition, and therefore the second contract was merely void. It is true that in Noy's Maxims, p. 88, it is laid down, that "if I sell my horse for money, I may keep him until I am paid, but I cannot have an action of debt until he be delivered, yet the property of the horse is by the bargain in the bargainee or buyer; but if he presently tender me my money and I refuse it, he may take the horse or have an action of detinue." But that relates clearly to the case of a ready-money bargain. In *Goodall v. Skelton* (2 H. Black. 316), A. agreed to sell goods to B., who paid a certain sum as earnest. The goods were packed in cloth furnished by the buyer, and deposited in a building belonging to the seller until the buyer should send for them, but the seller declared at the same time that they should not be carried away till he was paid. It was held that the seller could not maintain an action for goods sold and delivered. In the present case the hay was to remain in possession of the seller, and not to be cut till paid for. This is distinguishable, therefore, from *Hinde v. Whitehouse* (7 East, 558), where sugars in the King's warehouse were held to pass to the buyer by the contract of sale, although the duties were not paid. It is more like *Tempest v. Fitzgerald* (3 B. & A. 680), where the purchaser of a horse for ready-money rode the horse, and requested that it might remain in B.'s possession for a further time, at the expiration of which he promised to fetch it away and pay the price. This was assented to by the seller, and it was held that the seller could not recover on a count for horses bargained and sold, there having been no acceptance of the horse within the meaning of the Statute of Frauds.

Bayley, J.—It is quite clear that the loss must fall upon him in whom the property was vested at the time when it was destroyed by fire. And the question is in whom the property in this hay was vested at that time. By the note of the contract delivered to the plaintiff,

the defendant agreed to *sell* the plaintiff a stack of hay standing in Canonbury Field at the sum of £145, the same to be paid for on the 4th day of February next, and to be allowed to stand on the premises until the 1st day of May next. Now this was a contract for an *immediate*, not a prospective sale. Then the question is, in whom did the property vest by virtue of this contract? The right of *property* and the right of *possession* are distinct from each other; the right of possession may be in one person, the right of property in another. A vendor may have a qualified right to retain the goods unless payment is duly made, and yet the property in those goods may be in the vendee.

The fact in this case, that the hay was not to be paid for until a future period, and that it was not to be cut until it was paid for, makes no difference, provided it was the intention of the parties that the vendee should, by the contract, immediately acquire a right of property in the goods, and the vendor a right of property in the price.

The rule of law is, that *where there is an immediate sale, and nothing remains to be done by the vendor as between him and the vendee, the property in the thing sold vests in the vendee*, and then all the consequences resulting from the vesting of the property follow, one of which is, that if it be destroyed, the loss falls upon the vendee. The note of the buyer imports also an immediate, perfect, absolute agreement of sale. It seems to me that the true construction of the contract is, that the parties intended an immediate sale; and if that be so, the property vested in the vendee, and the loss must fall upon him. The rule for entering a non-suit must therefore be made absolute.

Holroyd, J.—I think that in this case there was an immediate sale of the hay, accompanied with a stipulation on the part of the vendee, that he would not cut it till a given period. Now in the case of a sale of goods, if nothing remains to be done on the part of the seller, as between him and the buyer, before the thing purchased is to be delivered, the property in the goods immediately passes to the buyer, and that in the price to the seller, but if any act remains to be done on the part of the seller, then the property does not pass until that act has been done. I am of opinion, therefore, in this case, not only that the property immediately passed to the buyer by contract, but that the seller thereby immediately acquired a right in the price stipulated to be paid for the goods, although that was not to be paid until a future day. The

property having passed to the vendee, and having been accidentally destroyed before the day of payment, the loss must fall upon him.

Littledale, J.—The parties on the 4th of January stipulated for the sale and purchase of a stack of hay, to be paid for in a month. Thus the case would have stood, but for the note of the contract delivered to the buyer, and in that there was a stipulation, that the purchaser should not cut until the money was paid, but the property in the hay had already passed by the contract of sale to the purchaser, and the latter afterwards merely waived his right to the immediate possession. Then the property having passed to the buyer, the loss must fall upon him, and consequently, this rule for entering a nonsuit must be made absolute.

Rule absolute.

HANSON AND ANOTHER, ASSIGNEES OF WALLACE
AND HAWES, BANKRUPTS, v. MEYER.

Trin. Term, 45 Geo. III. 1805, Tuesday, July 2.

[REPORTED 6 EAST, 614.]

Under a contract of sale, whereby the vendee agreed to purchase all the starch of the vendor, then lying at the warehouse of a third person, at so much per cwt., by bill at two months, which starch was in papers, but the exact weight not then ascertained, but was to be ascertained afterwards; and fourteen days were to be allowed for the delivery; and the vendor gave a note to the vendee, addressed to the warehouse-keeper, directing him to weigh and deliver to the vendee all his starch: held that under this contract the absolute property in the goods did not vest in the vendee before the weighing, which was to precede the delivery, and to ascertain the price; and that part of the starch having been weighed and delivered to the vendee by his direction, the vendor might, notwithstanding such part delivery, upon the bankruptcy of the vendee, retain the remainder, which still continued unweighed in the warehouse in the name and at the expense of the vendor.

This was an action of trover brought to recover the value of 33

cwt. 1 qr. 21 lb. of starch, which was tried before Lord *Ellenborough*, C. J., at the sittings at Guildhall after Trinity Term, 1803, when there was a verdict for the defendant; and a motion being made for a new trial, which was argued in last Michaelmas Term, the Court by consent in Hilary Term last ordered a case to be made of the facts that were proved at the trial, which are as follows:—

The plaintiffs are assignees of J. Wallace and W. Hawes, under a commission of bankrupt issued against them. The defendant is a merchant in London. In January, 1801, the bankrupts employed Wright, their broker, to purchase of the defendant a quantity of starch, about four tons, belonging to the defendant, and which was then lying in the Bull Porters' warehouse in Seething Lane; and Wright accordingly purchased the starch of the defendant at £6 per cwt., and sent to the bankrupts, his principals, the following note:—"Dear Sirs, I have bought that small parcel of starch which you saw of Mr. James Meyer for your account, £6 per cwt. by bill at two months; fourteen days for delivery from the 14th instant. January 15, 1801. Yours, etc., T. Wright. The starch lay at the Bull Porters." The broker purchased for the bankrupts all Meyer's starch that lay there, more or less whatever it was, at £6 per hundredweight: it was in papers: *the weight was to be afterwards ascertained at the price aforesaid.* The mode of delivery is as follows:—The seller gives the buyer a note addressed to the warehouse-keeper, to weigh and deliver the goods to the buyer. This note is taken to the warehouse-keeper, and is his authority to weigh and deliver the goods to the vendee. The following note was given by the defendant:—"To the Bull Porters, Seething Lane. Please to *weigh and deliver* to Messrs. Wallace and Hawes all my starch. January 17, 1801. Per James Meyer, William Elliott." This order was lodged by the bankrupts at the Bull Porters' warehouse, on the 21st of January, 1801, on which day the bankrupts required the Bull Porters to weigh and deliver to them 540 papers of the starch which weighed 21 cwt. 1 qr. 6lb. And on the 31st of January . . . 250 9 ,, 1 ,, 20 ,, And on the 2nd of February . . . 400 15 ,, 1 ,, 4,,

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At which respective times the Bull Porters, in consequence of their order, weighed and delivered the same to the bankrupts, who

immediately removed the same: the residue thereof being 33 cwt. 1 qr. 21 lb. remained at the Bull Porters' warehouse till the failure of Wallace and Hawes. The above quantities of starch continued at the Bull Porters' warehouse, in the name and at the expense of the defendant, till they were weighed and delivered: and the residue also afterwards continued there in like manner unweighed, in his name, and charged to his expense. On the 8th of February, 1801, Wallace and Hawes became bankrupts. It was admitted that the defendant, after the bankruptcy, took away the remainder of the starch that had *not been so weighed*. The question for the opinion of the Court was, whether the defendant was entitled to the above verdict? If the Court should be of opinion that he was, then the verdict was to stand: if not, then a new trial was to be granted upon such terms as the Court should direct.

Humphreys for the plaintiffs.—This was an entire contract which could not be severed or apportioned, and therefore upon the delivery of any part of the starch to the bankrupts, the property of the whole became vested in them. It was not a contract for so many cwt. of starch, but for *all* the defendant's starch which lay at the Bull Porters' warehouse; the weight only of which was to be afterwards ascertained; but the whole was to be paid for by one bill. And there is the more reason for holding such a contract to be entire, because the price of the whole may be governed by the average quality, and the part received may be the worst: or, at any rate, it may be an inducement to a purchaser to give more for the whole than he would for a part, in order to withdraw so much competition out of the market. After the order for delivery the bankrupts might have taken the whole as well as a part. In *Bro. Ab. Apportionment*, pl. 7, it is said, that "a contract cannot be severed or apportioned, etc., because it is entire; and if it be destroyed in part, it is destroyed in the whole." Again, *Bro. Contract* pl. 34, "If a man sell a lease of land and certain cloaths for £10, the contract is entire, and cannot be severed; though one of the things were by a defeasible title," etc. So in *Hawkins v. Cardy*, (1 *Ld. Raym.* 360), it was ruled that a bill of exchange, being one entire contract, could not be apportioned by endorsement so as to make the drawer liable in part to different holders. If the vendees had continued solvent, and after taking part of the starch a fire had consumed the remainder in the warehouse, they would still have been liable; for after the sale, the commodity is at the risk of the

vendee. Bro. Abr. Contract, pl. 26. Upon the same principle, if goods purchased are to be paid for before they are taken away, and afterwards the vendor gives the vendee liberty to take away a part without payment, that would dispense with the condition as to the remainder, according to the doctrine in *Dumport's* case, (4 Co. 119, b.) ; and the only remedy of the vendor would be upon the contract for the value of the goods sold. It is clear from the cases of *Slubey v. Heyward*, (2 H. Black. 504), and *Hammond v. Anderson*, (1 Bos. & P. N. C. 69), that after a part delivery there can be no stopping *in transitu*, which is decisive as to the property of the whole being absolutely vested in the vendee. And yet in the latter case the vendor put in his claim before the expiration of fourteen days, during which time the goods were to remain at his charge in the wharfinger's warehouse. The only distinction between the two cases is, that here the starch was to remain in the warehouse at the expense of the vendor till it was weighed ; but that was merely to ascertain the price, and would not alter the legal property. It was also observed, that no cases in equity had occurred which applied pointedly to the present. *Fawell v. Heelis*, (Amb. 724) was mentioned as coming nearest ; where it was holden that a vendor of an estate who had taken a bond for the consideration-money had no lien on the estate against the creditors of the vendee, for whose benefit the estate was assigned ; and here the vendor had relied on the security of a bill which was to be given payable at a future day.

Holroyd, contra, after observing that it was just and reasonable that upon every sale of goods the vendor should either receive the stipulated price, or should have power to retain the goods, or so much of them as were not absolutely delivered over to the vendee upon credit, contended first, that the legal property of so much of the starch as remained unweighed in the warehouse did not pass to the vendees : or, 2ndly, if it did, yet the vendor retained a lien upon it for the stipulated price of the whole. 1st. On a sale of specific goods (and these may be taken to be so, being a specific quantity of starch, though the amount was not ascertained at the time of the contract,) the property does not pass except upon payment, or tender of payment by the buyer, or where the time of payment is by consent postponed (2 Black. Comm. 446, 7.) Now here, by the terms of the contract, 14 days were to be allowed for the delivery on the one hand, and on the other, the payment was to be by a bill at two months : the vendees, therefore, were not bound to pay for the

starch till it was delivered, nor was the vendor bound to part with it till he received the bill. In *Knight v. Hopper* (Skin. 647), where the note of the contract of sale was to this purpose:—"Bought by Knight, of Hopper, 100 pieces of muslin, at 40s. per piece, to be fetched away by 10 pieces at a time, and paid for as taken away," what was relied upon by *Holt, C.J.*, as altering the property immediately was, that the pieces were *marked and sealed* by the vendee; and there too the price was fixed; but here there was no act done by the vendees to mark the goods as their own. It was not an order simply to *deliver*, but to "*weigh and deliver*," the *weighing* was to precede the *delivery*: and even the price could not be ascertained till they were *weighed*; so that till then it could not be known whether the vendees would pay the price or not; but certainly the vendor was not bound to part with the goods till he had a bill at two months for the ascertained value. In a case (*Anon.* 12 Mod. 344) where a son employed his father to buy a frame for him, and the father purchased it in his own name, and paid part of the money, and gave a note for the rest; *Holt, C.J.*, held, that by the payment of the money *and giving the note*, the property of the frame was immediately vested in the father; and that the bill of sale which was made a month afterwards to the son did not divest the property out of the father and vest it in the son; though it would have vested it in the son if it had been made at the time of the sale. And he added, that *earnest* does not alter the property, it only binds the bargain; and the property remains in the vendor *till payment or delivery of the goods*. In 2 Black. Comm. 443, it is said that a contract *executory*, as if two agree to change horses *next* week, vests only a *right*, and their reciprocal property in each other's horse is not in possession but in *action*, &c., for a contract *executory* conveys only a *chose in action*. Here then till the goods were weighed and the price ascertained, and the bill given or at least tendered, the contract remained *executory*, and no property passed; but each only had his remedy upon the contract on failure of performance by the other. 2ndly. At any rate however, if the property did pass to the vendees, the vendor had a lien on the goods for the price, or the bill, provided the vendees had remained solvent and capable of giving such a security. If the rest of the goods had remained in the vendor's own possession, there could have been no doubt that he might have retained any part for the price at least of that part. If one ordered a hundred pair of shoes of a shoemaker at so much a pair to be paid for by a bill; though the shoemaker had delivered

half, yet if the vendee became insolvent the tradesman would not be bound to deliver the remainder without payment. And yet the insolvency does not rescind the contract; but the vendor has an equitable lien for the price, and this lien continues notwithstanding even a part payment; as in *Hodgson v. Loy* (7 T. R. 440, 5) and *Feise v. Wray* (3 East, 93), where part payment of the goods was holden not to divest the vendor's right to stop *in transitu*; and *à fortiori* it cannot divest his lien upon the goods while they still continue in his possession; for Lord *Kenyon* himself put it upon that ground; saying, "that the right of the vendor to stop goods *in transitu* in case of the insolvency of the vendee was a *kind of equitable lien* adopted by the law for the purposes of substantial justice, and that it did not proceed on the ground of rescinding the contract. Then it cannot vary the case that the goods here were in the hands of a middleman, for they remained all the time in the Bull Porters' warehouse, *in the vendor's name* and *at his expense*. In the cases in the Common Pleas there was a severance by the vendees themselves of part of the goods from the rest, which could not have been done without a possession of the whole by them, so as to bar the vendor's right of stopping any part as *in transitu*. And in *Hammond v. Anderson* (1 Bos. & P., N. R. 69) there was this further material circumstance, that all the goods had been weighed out to the vendee. But cases of *transitus* do not affect the question of *lien*, which can only arise when the goods are in the actual or constructive possession of the vendor. Liens are mutual; and a sale is only an exchange of goods for money; but if a delivery of part of the goods contracted for, without payment, be a waiver of the vendor's lien for the price, then by payment of part of the money by the purchaser he would waive his lien on the remainder, which might be recovered from him by action without a delivery of the goods. Suppose an exchange of two horses for one, would a delivery of one of these two preclude the owner's lien on the other till the delivery of the one horse for which the two were to be exchanged? There is no distinction in reason between an exchange of goods for goods, and of goods for money. If an action be brought by a vendee, after part of the price of goods paid, he must allege that he paid or offered to pay the remainder. The principle is general, that he who sues another for a breach of contract must aver performance, or what is equivalent to performance on his part; as in *Morton v. Lamb* (7 T. R. 125) and *Callonel v. Briggs* (Salk. 112); and therefore the vendor of goods has a lien on any part of

them for the price of the whole ; he only lessens his security by delivering up any part before payment. Thus in *Sodergren v. Flight and Jennings* before Lord *Kenyon* at Guildhall, sittings after Trin. Term, 1796, in action for freight, it appeared that the plaintiff was the captain and owner of a Swedish ship freighted by Schenling and Co. for London, with a cargo of tar and iron consigned to Hippus, a merchant in London, who held two bills of lading for the same. The defendants in December, 1795, before the arrival of the ship, purchased all the tar of Hippus and gave him three acceptances for the value, including a proper allowance for freight and duty which were to be paid by Hippus, and Hippus endorsed the two bills of lading to the defendants or their order, one of which was for tar alone, 900 barrels, the other for 850 barrels of tar and a quantity of iron. Hippus sold the iron to Crawshay and Co. ; and for this purpose obtained from the defendants the possession of the bill of lading which included the iron, and delivered it to Crawshay and Company, concerning which there was no question. On the 11th January, 1796, the ship arrived, and was entered and reported by Hippus, and before the 25th, 721 barrels of tar were delivered to the defendants. On that day Hippus stopped payment, on which the Captain refused to deliver the remainder of the tar to the defendants, unless they would pay the freight not only of what remained but of what had been before delivered, which they refused to do ; but after some dispute, the whole cargo of tar was agreed to be delivered to the defendants, and that an action should be brought by the captain for the whole freight, in order to try the right of his lien, the defendants having offered to pay the freight of that which remained on board the ship, but refusing to pay the freight of that part which had been before delivered to them, and also of a certain portion which had been delivered out of the ship on board a lighter sent by the defendants to receive it, but which still lay along-side of the ship, fastened thereto by the captain's orders, to prevent its final removal. The defendants paid into Court in the action £353. 1s. 2d., being as much as would cover the plaintiff's demand for freight on all the tar comprised in one of the bills of lading ; and each being made " unto order, he, or they *paying freight for the said goods.*" And the plaintiffs, under the direction of Lord *Kenyon*, recovered £300. 15s. 10d. beyond the money paid into Court, being the entire amount of the freight for the tar ; his Lordship being of opinion that the captain had a lien on the tar remaining on board for the whole freight, as well the freight of the barrels

delivered as of those remaining on board, belonging all to the same person and under one consignment. But he thought that if Hippius had sold the tar to different persons, the captain could not have made one pay for the freight of what had been delivered to another. [*Le Blanc*, J., that was where all the goods were received on board under one contract.] So in *Langfort v. Administratrix of Tiler*¹, the defendant in the lifetime of the intestate, her husband, having bought of the plaintiff four tubs of tea, one of which she paid for and took away, leaving £50 earnest for the other three. *Holt*, C.J., held that notwithstanding the earnest (which only bound the bargain, and gave a right to demand the rest *on payment of the money*), the money must be paid upon fetching away the goods, because no other time for payment was appointed; and that if the vendee did not come and pay for the goods in a reasonable time, after request, the agreement was dissolved, and the vendor was at liberty to sell them to any other person. In *detinue* (*Anon.* Dy. 296) where there had been a part delivery of a certain quantity of corn contracted for, and payment for what was so delivered, the Court considered that the vendor had a lien upon the remainder for the residue of the money, and was not bound to deliver it till payment, and might plead *non detinet*. And the distinction was taken, that if goods be bought outright, the bargain is void if the vendee do not pay the price agreed upon immediately; but if a day of payment be appointed, the vendor shall have his action of debt, the vendee an action of *detinue*. As to the position in *Dumpor's case* (4 Co. 119, b.), that a *condition* waived in part is waived *in toto*, it cannot apply to *liens*, which at most are only conditions in law founded on principles of equity, and not like conditions stipulated for by the parties themselves, which are always construed strictly, being in general to defeat an estate or to create a forfeiture.

Humphreys, in reply, said, that the property was altered by a sale as well where a future day of payment was given as where the goods were paid for at the time. 1 Com. Dig. 313, Agreement, B. 3, cites 10 H. 7, 8 a.; 14 H. 8, 20 a.; Dy. 30 a. It is true the vendor might have withheld the order for delivery till he received the bill which was agreed to be taken for payment; but he waived

¹ Salk. 113. The same case is reported in 6 Mod. 162, where the case is stated to be, that the goods were contracted to be sold by the defendant to the plaintiff, who paid for one of the tubs, and gave 50s. earnest for the remainder; and the

declaration contained two counts, one on the agreement, as it appears for the non-delivery of the other tubs; the other to receive back the 50s. as so much received to the plaintiff's use. The result of the doctrine is the same in both books.

that benefit, and gave an order for the delivery of the whole. Then the severance of the part was as much evidence of a possession of the whole by the vendee in this case as in the late cases in the Common Pleas. Those cases went on the ground that the sale of the goods being by one entire contract, possession of part was possession of the whole out of which such part was taken. And if the property passed by the contract, the payment of the warehouse rent afterwards by the vendor cannot alter it.

Cur. adv. vult.

Lord ELLENBOROUGH, C.J., now delivered judgment.

By the terms of the bargain formed by the broker of the bankrupts on their behalf, two things, in the nature of conditions or preliminary acts on their part, necessarily preceded the absolute vesting in them of the property contracted for. The first of them is one which does so according to the generally received rule of law in contracts of sale, viz. the *payment* of the agreed price or consideration for the sale. The second, which is the act of *weighing*, does so in consequence of the particular terms of this contract, by which the *price* is made to depend upon the *weight*. The weight, therefore, must be ascertained in order that the price may be known and paid; and unless the weighing precedes the delivery it can never, for these purposes, effectually take place at all.

In this case, a partial weighing and delivery of several quantities of the starch contracted for had taken place; the remainder of it was unweighed and undelivered; and of course no such bill of two months for the price so depending on the weight could yet be given. The question is, what is the legal effect of such part-delivery of the starch on the right of property in the undelivered residue thereof? On the part of the plaintiffs it is contended, that a delivery of part of an entire quantity of goods contracted for is a virtual delivery of the whole, so as to vest in the vendee the entire property in the whole, although the price for the same should not have been paid. This proposition was denied on the part of the defendant, and many authorities have been cited on both sides. But, without deciding at present what might be the legal effect of such part-delivery in a case where the payment of price was the only act necessary to be performed in order to vest the property, in this case another act, it will be remembered, was necessary to precede both payment of the price and delivery of the goods bargained for, viz. weighing. This preliminary act of weighing it certainly never was in the con-

temptation of the sellers to waive in respect of any part of the commodity contracted for. The order stated in the case from the defendant to the Bull Porters, his agents, is *to weigh and deliver all his starch*. Till it was *weighed*, they, as his agents, were not authorized to deliver it. Still less were the buyers themselves or the present plaintiffs, their assignees, authorized to take it by their own act from the Bull Porters' warehouse. And if they could not so take it, neither can they maintain this action of trover, founded on such a supposed right to take, or in other words, founded on such a supposed right of property in the subject-matter of this action. If anything remain to be done on the part of the seller, as between him and the buyer, before the commodity purchased is to be delivered, a complete present right of property has not attached in the buyer; and of course this action, which is accommodated to and depends upon such supposed perfect right of property, is not maintainable. The action failing, therefore, on this ground, it is unnecessary to consider what would have been the effect of non-payment of price on the right to the undelivered residue of the starch, if the case had stood mainly on that ground, as it did in the case of *Hammond v. Anderson* (1 Bos. & P. N. R. 69), where the bacon sold in that case was sold for a certain fixed price, and where the weighing, mentioned in that case, was merely for the buyer's own satisfaction, and formed no impediment in the contract between him and the seller; though it formed a very important circumstance in the case, being an unequivocal act of possession and ownership as to the whole quantity sold on the part of the buyer. In like manner as the taking 800 bushels of wheat out of the whole quantity sold, and then on board the ship, was holden to be in the case of *Slubey v. Heywood*, 2 H. Black. 504. Without therefore touching the question which has been the main subject of argument in this case, and upon which my opinion at *nisi prius* principally turned, and without in any degree questioning the authority of the above-mentioned two cases from the Common Pleas, this verdict may be sustained on the ground that the weighing, which was indispensably necessary to precede the delivery of the goods, inasmuch as it was necessary to ascertain the price to be paid for them, had not been performed at the time when the action was brought. The verdict therefore must stand, and judgment be entered for the defendant.

In *Turling v. Baxter* and *Hanson v. Meyer*, the question was much discussed when and how far on a sale the *property* in movable goods and chattels passes to the vendee, although they may still remain in the *possession* of the vendor. This is a question of great importance, not only because the form of the remedy may frequently depend upon the answer to it, but because in the event of the destruction of the goods, the loss will in general fall upon the owner; and moreover in the event of the bankruptcy or insolvency of the owner, his assignees will be entitled to them. In the case of the purchaser being owner becoming bankrupt or insolvent, the goods will vest in his assignees, but the vendor will have his lien upon the goods if in his possession for the unpaid purchase-money, and may stop them *in transitu* before they have got into the actual or constructive possession of the purchaser; in case of the vendor being owner becoming bankrupt or insolvent, the purchaser, though he may have paid the purchase-money, cannot recover the goods, as they will vest in the assignees, while he will only be able to go in with the other creditors, and prove the payment of the purchase-money as a debt against the bankrupt's or insolvent's estate.

It may easily be seen what numerous and difficult questions may arise upon this subject. "It is impossible," says a learned judge, "to examine the decisions on this subject without being struck by the ingenuity with which sellers

have contended that the property in goods contracted for had, or had not, become vested in the buyers, according as it suited their interest; and buyers or their representatives have with equal ingenuity endeavoured to show that they had, or had not, acquired the property in that for which they had contracted; and judges have not unnaturally appeared anxious to find reasons for giving a judgment which seemed to them most consistent with natural justice. Under such circumstances it cannot occasion much surprise if some of the numerous reported decisions have been made to depend upon very nice and subtle distinctions, and if some of them should not appear altogether reconcileable with each other." Per *Cresswell*, P. C. 11 Moo. P. C. C. 566.

It is not intended here to go into the question as to what is essential to the validity of a contract for the sale of goods, but we will assume that a binding contract of sale, either according to the Statute of Frauds, or in cases not coming within it according to common law, has been entered into by the vendor and purchaser themselves, or through the intervention of agents, or of a broker acting as agent for both parties.

The first rule which we will notice, is that which is applicable to an immediate sale of a specific chattel, and which is well laid down in the principal case of *Turling v. Baxter*, viz., "That where there is an immediate sale, and nothing remains to be done by the vendor as

between him and the vendee, the property in the thing sold vests in the vendee, and then all the consequences resulting from the vesting of the property follow." See also *Wait v. Baker*, 2 Exch. 1; *Aldridge v. Johnson*, 7 Ell. & Bl. 900. The reason given for the rule is, "That where by the contract itself the vendor appropriates to the vendee a specific chattel, and the latter thereby agrees to take that specific chattel, and to pay the stipulated price, the parties are then in the same situation as they would be after a delivery of goods in pursuance of a general contract. The very appropriation of the chattel is equivalent to delivery by the vendor, and the assent of the vendee to take the specific chattel and to pay the price is equivalent to his accepting possession. The effect of the contract therefore, is to vest the property in the bargainee." *Dixon v. Yates*, 5 B. & Ad. 340.

But although the property in such a case passes to the vendee, the vendor will be entitled to retain possession of the chattel until the price agreed upon be paid. "If, for instance, I sell my horse for money, I may keep him until I am paid, but I cannot have an action of debt until he be delivered; yet the property in the horse is, by the bargain, in the bargainee or buyer; but if he presently tender me my money, and I refuse it, he may take the horse, or have an action of detainue. And if the horse die in my stable between the bargain and the delivery, I may have an action of debt for my

money, because by the bargain the property was in the buyer." Noy's Maxims, 88. See also *Waterhouse v. Skinner*, 2 Bos. & P. 447.

But in a present contract of sale, if the day of payment be deferred, that is to say, if the goods are sold upon credit, the right to possession of the goods, in the absence of any intention appearing to the contrary, will, as well as the property, pass immediately to the vendee. Thus, in *Spartali v. Dencke*, 10 C. B. 212, a contract had been entered into for the sale of thirty bales of goat-wool at a certain price per pound, containing the following stipulation, "Customary allowance for tare and draft, and to be paid for by cash in one month, less five per cent. discount." It was held by the Court of Common Pleas that the vendee was entitled to have the goods delivered to him immediately, or within a reasonable time, but was not bound to pay for them until the expiration of a month. "It is now undoubted law," said *Wilde*, C. J., "that by a sale of specific goods for an agreed price, the property passes to the buyer and remains at his risk. *Rugg v. Minett* (11 East, 210), *Hinde v. Whitehouse* (7 East, 558), and many other cases; and it is equally clear law, that where by the contract the payment is to be made at a future day, the lien for the price which the vendor would otherwise have, is waived, and the purchaser is entitled to a present delivery of the goods without payment, upon the ground that the lien would be inconsistent with

the stipulation in the contract, for a future day of payment. *Chase v. Westmore*, 5 M. & Selw. 186; *Crawshay v. Homfray*, 4 B. & Ald. 50; *Cowell v. Simpson*, 16 Ves. 275." *Martindale v. Smith*, 1 Q. B. 389.

But although the right of possession as well as the property passes at once to the vendee on an immediate sale of goods, if the time of payment be deferred, nevertheless, as was done in the principal case of *Tarling v. Baxter*, the vendor may enter into a stipulation according to which the right of possession will remain with him until payment of the price. Even in that case, although the right of possession remains in the vendor, the property having passed to the vendee, the goods will be at his risk.

In order that the property in a thing sold should pass without delivery to the vendee, it must be a specific and ascertained chattel. "Till the parties," says a learned author, "are agreed on the specific individual goods, the contract can be no more than a contract to supply goods answering a particular description; and since the vendor would fulfil his part of the contract by furnishing any parcel of goods answering that description, and the purchaser could not object to them if they did answer the description, it is clear there can be no intention to transfer the property in any particular lot of goods more than another, till it is ascertained which are the very goods sold." Black. Cont. of Sale, 122. And it is immaterial that

the goods are so far ascertained that the parties have agreed that they shall be taken from some specified larger stock. This has been laid down as law from a very early period (see 18 Edw. IV. 14; *Heyward's case*, 2 Co. 36), and has been adhered to and also frequently illustrated by modern decisions. Thus in *Busk v. Davis*, 2 M. & Sel. 397, the plaintiffs sold ten out of eighteen tons of Riga flax, then lying in mats at the defendant's wharf, at £118 per ton, to be paid for by the vendee's acceptance at three months' date. The plaintiffs gave the vendee an order on the defendants (the wharfingers) to deliver ten tons to the vendee or order, which the defendants entered in their books. While the flax remained at the wharf in the same state as at the time of the sale, the vendee stopped payment, and the plaintiffs gave an order countermanding the delivery. The plaintiffs having brought an action of trover for the flax, it appeared that the quantity before delivery was usually ascertained by being weighed by the wharfinger, the mats being of unequal quantities, so that a fraction of a mat might be required, and an allowance for tare and draft had likewise to be made; but the plaintiffs had received no return of the weight from the wharfingers. It was held by the Court of King's Bench that the sale was not complete so as to pass the property, inasmuch as the anterior process of weighing had not taken place, and that the plaintiffs were

therefore entitled to a verdict. "The question," said Lord *Ellenborough*, C.J., "in this case is whether the property has been so ascertained as to be considered in law as effectually delivered, the order to deliver having been given to the wharfingers, and entered in their books. That would not of itself be sufficient unless the flax were in a deliverable state, and if further acts were necessary, for the flax was to be weighed and the portion of the entire bulk to be delivered was to be ascertained, and if the weight of any number of unbroken mats were insufficient to satisfy the quantity agreed upon, it would have been necessary to break open some mats in order to make up that quantity. Therefore it was impossible for the purchaser to say that any precise number of mats exclusively belonged to him. If the weight did not divide itself in an integral manner, it would be necessary to break up and take some fraction of another mat. Every component part therefore was uncertain; it was uncertain how many gross mats there would be, or what fraction of a broken mat; for, as it has been suggested, any certain number of mats might fall short of the entire, precise quantity of ten tons. That is only one circumstance to show that there was some uncertainty at the time of the contract, which was to be reduced to certainty by something to be done afterwards, that is, by weighing, in order to ascertain the entire quantity. If

then some further acts were to be done in order to regulate the identity, and (if I may use such a phrase) the individuality of the thing to be delivered, I cannot say that it was in a fit state for immediate delivery, and that the order to deliver entered in the wharfinger's books operated as a complete delivery." See also *Shepley v. Davis*, 5 Taunt. 617; *Withers v. Lyss*, 4 Campb. 237. In *White v. Wilkes* (5 Taunt. 176), there was a contract for the sale of "twenty tons of linseed oil, at £60 per ton, usual allowances; to be delivered in one month, and paid for in four days by acceptance at four months." The defendant was possessed of large quantities of oil lying in several different cisterns at different warehouses, nor was any specific quantity of twenty tons weighed out for the purchasers. An action of trover having been brought by the assignees of the purchasers (who had become bankrupt), it was held by the Court of Common Pleas, that no property in any oil passed by the contract to the purchasers. "The objection here is," said *Mansfield*, C.J., "that no specific quantity of oil was sold. The quantity agreed to be sold was mixed with a much larger quantity; and not only that, but it was mixed with several different quantities. How was it to be separated? . . . This too is the case of a liquid, which makes the difficulty much greater than in the case of a solid substance." *Heath*, J., also well observed: "Suppose

a part of the oil in some of these cisterns were lost or burnt, who is to know whether it is the vendor's or the purchaser's oil that is destroyed?" See also *Wallace v. Breeds*, 13 East, 522; *Austen v. Craven*, 4 Taunt. 644. See and consider the case of *Whitehouse v. Frost*, 12 East, 614.

Although the parties to a contract may not originally have selected specific goods to which it may be applied, there will be no difficulty if they both subsequently do so, as where one of them appropriates specific goods to the fulfilment of the contract, and where the other party assents to such appropriation. See *Rhode v. Thwaites*, 6 B. & C. 388. There the plaintiff, having in his warehouse a quantity of sugar in bulk, more than sufficient to fill twenty hogsheads, agreed to sell twenty hogsheads to the defendant, but there was no note or writing of the contract sufficient to satisfy the Statute of Frauds. Four hogsheads were delivered to and accepted by the defendant. The plaintiff filled up and appropriated to the defendant sixteen other hogsheads, and informed him that they were ready, and desired him to take them away. The defendant said he would take them as soon as he could. It was held by the Court of Queen's Bench that the appropriation having been made by the plaintiff, and assented to by the defendant, the property in the sixteen hogsheads thereby passed to the latter, and that their value might be recovered

by the plaintiffs under a count for goods bargained and sold. "The sugars," said *Holroyd, J.*, "agreed to be sold being part of a larger parcel, the vendors were to select twenty hogsheads for the vendee. That selection was made by the plaintiffs, and they notified it to the defendant; and the latter then promised to take them away. That is equivalent to an actual acceptance of the sixteen hogsheads by the defendant. That acceptance made the goods his own, subject to the vendor's lien as to the price. If the sugars had afterwards been destroyed by fire, the loss must have fallen on the defendant. I am of opinion that the selection of the sixteen hogsheads by the plaintiffs, and the adoption of that act by the defendant, converted that which was before a mere agreement to sell into an actual sale, and that the property in the sugars thereby passed to the defendant, and, consequently, that he was entitled to recover the value of the whole under the count for goods bargained and sold." See also *Sparkes v. Marshall*, 2 Bing. N. C. 761; *Aldridge v. Johnson*, 7 Ell. & Bl. 885.

In order however that an assent to an appropriation of chattels by the vendor should be valid, it is essential (except in cases where the vendor has of himself alone authority to make the appropriation) that the vendee should agree to all the terms upon which the appropriation is made. *Godts v. Rose*, 17 C. B. 230, 237, 238.

A question of considerable diffi-

culty arises when the original agreement does not ascertain the specific goods, and one party has appropriated some particular goods to the agreement, but the other party has not subsequently assented to such an appropriation. Such an appropriation is revocable by the party who made it, and not binding on the other party, *unless it was made in pursuance of an authority to make the election conferred by the agreement*; or unless the act is subsequently and before its revocation adopted by the other party. In either case it becomes final and irrevocably binding on both parties. Black. Cont. of Sale, 127.

The question of whether there has been a subsequent assent or not, is one of fact; the other question of whether the selection by one party merely showed an intention in that party to appropriate those goods to the contract, or a determination of a right of election is one of law, and sometimes of some nicety. *Ib.* 128.

The rule laid down in *Heyward's case* (2 Co. 36) upon this subject seems to have been generally adopted, namely, that "in case election be given of two several things, always he who is the first agent, and who ought to do the first act, shall have the election." See Com. Dig. "Election."

It is said by a learned author that "where from the terms of an executory agreement to sell unspecified goods, the vendor is to despatch the goods, or to do anything to them which cannot be

done till the goods are appropriated, he has a right to choose what the goods shall be; and the property is transferred the moment the despatch or other act has commenced, for then an appropriation is made finally and conclusively, by the authority conferred in the agreement, and, in Lord *Coke's* language, 'the certainty, and thereby the property, begins by election.'" Black. Cont. of Sale, 128. In *Fragano v. Long*, 4 B. & C. 219, it was held that goods ordered to be sent from this country abroad, vested in the purchaser by the vendor's act of appropriation on his despatching them from his warehouse on their journey.

In other cases the act of appropriation may take place at an earlier period, as, for instance, when the vendor, in pursuance of his contract, places the goods bought in bags or bottles furnished by the purchaser. Thus, in *Aldridge v. Johnson*, 7 Ell. & Bl. 885, the plaintiff agreed with Knights to purchase from him 100 out of 200 quarters of barley which the plaintiff had seen in bulk and approved of, and he paid part of the price. It was agreed that the plaintiff should send sacks for the barley; and that Knights should fill the sacks with the barley, take them to a railway, place them upon trucks free of charge, and send them to the plaintiff. The plaintiff sent sacks enough for a part only of the 100 quarters; these Knights filled, and endeavoured to find trucks for them, but was unable to do so. The plaintiff re-

peatedly sent to Knights, demanding the barley. Knights emptied the barley from the sacks back into the bulk, and afterwards became bankrupt. It was held by the Court of Queen's Bench that the property, in so much of the barley only as was put into the sacks, passed to the plaintiff, and that the assignee having removed the whole of the barley, had thereby converted the plaintiff's barley which had been put into the sacks. *Crompton, J.*, expressed, it is true, some doubt as to whether the barley put into the sacks passed to the plaintiff, on the ground that it did not appear quite clearly that at the time when the plaintiff demanded the barley, he knew that any portion had been put into the sacks, and that therefore his assent to the particular appropriation was doubtful. The rest of the Court, however, considered that even if the assent of the purchaser were doubtful, the appropriation was complete, inasmuch as the right of ascertaining the thing sold rested solely in the vendor. "I am clearly of opinion," said *Erle, J.*, "that the property in what was put into the sacks passed to the plaintiff. It is clear that where there is an agreement for the sale and purchase of a particular chattel, the chattel passes at once. If the thing sold is not ascertained, and something is to be done before it is ascertained, it does not pass till it is ascertained. Sometimes the right of ascertainment rests with the vendee, sometimes solely with the vendor. Here it is vested

in the vendor only—the bankrupt. When he had done the outward act which showed which part was to be the vendee's property, his election was made and the property passed. That might be shown, by sending the goods by the railway; and in such case the property would not pass till the goods were despatched. But it might also be shown by other acts. Here was an ascertained bulk, of which the plaintiff agreed to buy about half. It was left to the bankrupt to decide what portion should be delivered under that contract. As soon as he does that, his election has been indicated; the decisive act was putting the portion into the sacks. If it were necessary to rest the decision on the assent of the vendee in addition to this, I am of opinion that there is abundant evidence of such assent; for the vendee demanded over and over again, the portion which had been put into the sacks. I think Mr. Blackburn has expressed the law with great clearness and accuracy. He first takes the case where one party appropriates and the other assents, and then the case where, by virtue of the original agreement, the authority to appropriate is in one party only. As to the question of conversion, I am of opinion on the grounds which have already been stated, that the assignee has converted the plaintiff's property."

This case was followed by the Court of Exchequer in *Langton v. Higgins*, 4 Hurlst. & Norm. 402: there in January, 1858, Carter

agreed to sell to the plaintiff all the crop of oil of peppermint grown on his farm in that year at 21s. per pound. In September, Carter wrote to the plaintiff for bottles to put the oil in. The plaintiff sent the bottles, and Carter having weighed the oil put it in the plaintiff's bottles, labelled them with the weight, and made out the invoices. Before however he had completed the filling of the bottles he sold and delivered several of them to the defendant. The plaintiff had, for many years past, bought of Carter his crop of oil of peppermint, and it was usual for Carter, when the bottles were filled, to deliver them to a carrier to take to a railway-station. In detinue, by the plaintiff against the defendant, for the bottles of oil of peppermint to be delivered to him, it was held by the Court of Exchequer, that the putting the oil in the plaintiff's bottles was an act of appropriation, which vested the property in the plaintiff. "The case of *Aldridge v. Johnson*, 7 Ell. & Bl. 885," said *Bramwell*, B., "is precisely in point. Lord *Campbell*, C. J., there said, 'Looking to all that was done when the bankrupt (the vendor) put the barley in the sacks, *eo instanti* the property in each sackful passed to the plaintiff.' It is true that in the 'Law Journal,' (26 L. J. Q. B. 296), *Erle*, J., is reported to have said that the outward act indicating the vendor's intention, was by filling the sacks, 'and directing them to be sent to the railway.' But *Crompton*, J., who doubted

upon another point, said that 'when the barley was put into the sacks, it was just as if it had been sent by a carrier.' There is not only reason and general authority, but also the case of *Aldridge v. Johnson*, to warrant our judgment." See also *Logan v. Le Mesurier*, 6 Moore, P. C. C. 116.

But however clearly the vendor may have expressed his intention to choose particular goods, and however expensive may have been his preparations for performing the agreement with respect to those particular goods, yet until the act has actually commenced, the appropriation is not final; for it is not made upon the authority of the other party nor binding upon him. Black. Cont. of Sale, 129; and see *Atkinson v. Bell*, 8 B. & C. 277. The result would be otherwise if the other party assented to such an intended appropriation. *Sparkes v. Marshall*, 2 Bos. & P. N. R. 761.

As a general rule, delivery to the agent of the vendee will be equivalent to a delivery to the vendee himself. "If," says *Parke*, B., "the intention of the parties to pass the property, whether absolute or special, in certain ascertained chattels is established, and they are placed in the hands of a depositary, no matter whether the depositary be a common carrier or shipmaster employed by the consignor, or a third person, and the chattels are so placed on account of the person who is to have that property, and the depositary assents, it is enough, and it matters not by what docu-

ments this is effected." *Bryans v. Nix*, 4 M. & W. 791. See the cases collected in Abbot on Shipping, 269, 9th edit.; *Henekey v. Earle*, 8 Ell. & Bl. 410; *Moredith v. Meigh*, 2 Ell. & Bl. 364; *Schuster v. McKellar*, 7 Ell. & Bl. 704; *Sheridan v. The New Quay Company*, 4 C. B. (n. s.) 618; *Turner v. Trustees of Liverpool Docks*, 6 Exch. 543; *Ellershaw v. Magniac*, ib. 570 n.; *Orr v. Murdock*, 2 Ir. Com. L. Rep. 9 (n.s.); *Hale v. Rawson*, 6 W. R. 339 (C. P.).

Although as a general rule, where, by the original contract for sale, or subsequently, the goods which are the subject-matter of it are either specified or ascertained, the property in such goods will pass to the vendee, because that is presumed to be the intention of the parties; the result will be different if their intention appears to have been otherwise.

The parties, for instance, may agree that the property in goods sold shall not be transferred until certain acts have been performed, and this will be binding upon them, whether such agreement be in express terms, or is to be implied from the whole contract taken together. Where, for instance, according to the contract of sale, some act is to be done by the vendor to the goods, for the purpose of putting them into a deliverable state, that is to say, into that state in which the vendee would be bound to receive them, until such acts are done, the property will not (in the absence of a contrary intention appearing) vest in the vendee.

So where the sale is of things which are sold by weight, number, measure, or quality, the sale will not be complete, and the property therein will not pass, although the specific goods are ascertained, until they have been either weighed, counted, measured, or tested, so as to ascertain the price which is to be paid for them. The principal case of *Hanson v. Meyer* is the first in which these rules were assumed in this country to be law, as was also done in the case of *Hinde v. Whitehouse*, 7 East, 558. They appear however to have been first acted upon in the case of *Rugg v. Minett*, 11 East, 210. There Rugg bought twenty-four lots of turpentine out of twenty-seven which were sold by auction. According to the terms of the contract of sale, twenty-five out of the twenty-seven lots were to be filled up by the sellers from the other two, and so made to contain each a specified quantity, and the two last lots were then to be measured and paid for according to their contents. Rugg's purchase included the two lots of uncertain quantities. The three lots which were not purchased by Rugg were filled up and removed, so that Rugg was clearly entitled to have what remained, and no difficulty could arise from the subject-matter not being ascertained. Rugg paid about £2,000 on account of the turpentine; the greater part of the lots were filled up, and the others were being filled up, when, by an accidental fire, the whole was consumed, no part having been delivered. Rugg

brought an action in the King's Bench to recover the £2,000 he had paid on account, and the Court held that all those lots which were filled up before their destruction were the property of the purchaser, and that the sellers were entitled to retain their price, but that the others remained the property of the sellers, who were bound therefore to refund the price received on account of them. With regard to the casks in the first lots which were filled up, Lord *Ellenborough*, C.J., said, that "according to the case of *Hanson v. Meyer*, and the other cases, everything having been done by the sellers which lay upon them to perform, in order to put the goods in a deliverable state in the place from whence they were to be taken by the buyers, the goods remained there at the risk of the latter. But with respect to the other ten casks, as the filling them up according to the contract remained to be done by the sellers, the property did not pass to the buyers, and therefore they are not bound to pay for them."

In *Zagury v. Furnell*, 2 Campb. 239, the contract of sale in the bought note was as follows:—"Bought of Mr. S. Z. 289 bales of goat-skins from Mogadore per Commerce, containing five dozen in each bale, at the rate of 57s. 6d. per dozen, to be taken as they now lay, with all faults, paid for by good bills at five months." It appeared that by usage of trade it is the duty of the seller of goat-skins by bales in this manner, to count them over, that it

may be seen whether each bale contains the number specified in the contract, and that before any of the skins in question had been counted over, the whole were destroyed by fire at the wharf where they lay at the time of the sale. It was held that an action could not be maintained against the purchaser for not accepting bills of exchange for the price of the skins, and that the loss fell entirely upon the seller, Lord *Ellenborough*, C.J., being of opinion that the enumeration of the skins was necessary to ascertain the price, this was an act for the benefit of the seller, and as this act remained to be done by him when the fire happened, there was not a complete transfer to the purchaser, and the skins continued at the seller's risk. The number of skins actually contained in the 289 bales being uncertain, the plaintiff had failed to show that he was authorized by the terms of the contract to draw the bills which the defendants had refused to accept. See also *Wallace v. Breeds*, 13 East, 522; *Busk v. Davis*, 2 Mau. & Selw. 397; *Austen v. Craven*, 4 Taunt. 644; *Shepley v. Davis*, 5 Taunt. 617; *Withers v. Lyss*, 4 Campb. 237.

A delivery of part of the goods sold will not be considered as a constructive delivery of the whole, if anything remains to be done either to ascertain the specific goods or their price. Thus, in *Simmons v. Swift*, 5 B. & C. 857, a contract of sale, signed by both of the parties, was entered into in the following terms:—"I have

this day sold the bark stacked at Redbrook, at £9. 5s. per ton of twenty-one hundredweight, to Ezekiah Swift, which he agrees to take, and pay for it on the 30th of November." Two persons were appointed on behalf of the parties to see the bark weighed. Soon afterwards, 8 tons and 14 cwt. of the bark were delivered to the purchaser. Before the rest of the bark was weighed, an extraordinary flood of the river Wye rose nearly to the height of five feet around the remainder of the stack of bark, and did it very considerable injury. The purchaser offered to pay for the 8 tons and 14 cwt., but refused to pay for the remainder. It was held by the Court of King's Bench, in an action for goods sold and delivered, that the property in the residue of the bark did not vest in the purchaser until it had been weighed, as that was necessary in order to ascertain the price to be paid, and consequently that it remained at the risk of the vendor, who was not entitled to maintain an action for the price against the purchaser. "Two questions," said *Bailey, J.*, "are involved in this case; first, whether the property in the bark was vested in the defendant, so as to throw all risks upon him; secondly, whether there had been such a delivery of the bark as would support this form of action. It is not perhaps necessary to give any opinion upon the first point, but I think it right to do so, as it is most satisfactory to determine the case upon the

main ground taken in the argument. I think that the property did not vest in the defendant so as to make him liable to bear the loss which has occurred. Generally speaking, where a bargain is made for the purchase of goods, and nothing is said about payment or delivery, the property passes immediately, so as to cast upon the purchaser all future risk, if nothing remains to be done to the goods, although he cannot take them away without paying the price. If anything remains to be done on the part of the seller, until that is done the property is not changed. In *Rugg v. Minnett*, (11 East, 216) and *Wallace v. Breeds* (13 East, 522), the thing which remained to be done was to vary the nature or quantity of the commodity before delivery; that was to be done by the seller. In other cases, the thing sold was to be separated from a larger quantity of the same commodity. This case was different; the subject-matter of the sale was clearly ascertained. The defendant agreed to buy the bark stacked at Redbrook, meaning of course all the bark stacked there; but it was to be paid for at a certain price per ton. The bargain does not specify the mode in which the weight was to be ascertained; but it was necessary that it should be ascertained before the price could be calculated, and the concurrence of the seller in the act of weighing was necessary. He might insist upon keeping possession until the bark had been weighed. If he were

anxious to get rid of the liability to accidental loss, he might give notice to the buyer that he should at a certain time weigh the bark, but until that act was done, it remained at his risk. In *Hanson v. Meyer* (*ante*, p. 545), weighing was the only thing which remained to be done; there was not any express stipulation in the contract that the starch (the subject-matter of the contract) should be weighed; that was introduced in the delivery order, but the nature of the contract made it necessary. So here, the contract made weighing necessary, for without that *the price could not be ascertained*. Suppose the plaintiff had declared specially upon this contract, he must have alleged and proved that he sold the bark at a certain sum per ton, that it weighed so many tons, and that the price in the whole amounted to a certain sum. The case of *Hanson v. Meyer* differs from this in one particular, viz. that the assignees of the vendee, who had become bankrupt, were seeking to recover the goods sold; but the language of Lord *Ellenborough*, as to the necessity of weighing in order to ascertain the price before the property could be changed, is applicable to the present case, and decides it. I therefore think that the bark which remained unweighed at the time of the loss was at the risk of the seller." See also *Cunliffe v. Harrison*, 6 Exch. 903; *Logan v. Le Mesurier*, 6 Moo. P. C. C. 116.

The same principle was acted upon in *Acraman v. Morrice*, 8 C.

B. 449. There the defendant had contracted with one Swift to purchase of him the trunks of certain oak trees, then felled and lying at Hadnock, about twenty miles from Chepstow. The usual course of trading between the parties was for the vendee's agent to select and mark such portions of the trees as he intended to purchase, and for Swift to sever the tops and sidings, and float the trunks down the river Wye to the vendee's wharf at Chepstow, and there deliver them. After a portion of the timber had been delivered, and the whole paid for, Swift became bankrupt; whereupon the defendant sent his men to the premises of the vendor at Hadnock, and severed and carried away such of the trees as had been marked. It was held by the Court of Common Pleas, that no property in the trees, or in any portion of them, which had not been delivered by the vendor, passed to the defendant by the contract; and that there was no delivery or acceptance to satisfy the statute of frauds, and consequently that the assignees of the vendor, were entitled to recover the value of the trees carried away in trover.

Where however the identity of the goods and the quantity and price are known, if the weighing and measuring of the goods is only necessary for the purpose of satisfying the purchaser that he has got what he contracted for, the sale will be complete, and the property will pass to him at once.

Swanwick v. Sothorn (9 Ad. & Ell. 895, 900).

When the measurement of several things sold has been taken, the mere adding up of the whole will not be considered as necessary to complete the measurement, so as to prevent the property from passing to the vendee. *Tansley v. Turner*, 2 Bing. N. C. 151, 154; 2 Sc. 241.

When the vendors have done every act on their part to be done, to put goods which they have sold into a deliverable state, the property in them will pass to the vendee. *Logan v. Le Mesurier*, 6 Moo. P. C. C., 116; *Gilmour v. Supple*, 11 Moo. P. C. C. 551. The fact that the vendors, either by the custom of trade, or by express contract, are bound to pay warehouse-rent for the goods during a certain period is immaterial. *Hammond v. Anderson*, 1 Bos. & P. N. R. 69; *Greaves v. Hepke*, 2 B. & Ald. 131.

Under a contract for making a thing, not existing in specie at the time of the contract, as, for instance, for building a vessel, or making a machine, in the absence of contract, or of circumstances from which a contrary conclusion may be drawn, no property vests in the party whom, for distinction, we may call the purchaser, during the progress of the work, nor until the thing is finished and delivered, or at least ready for delivery, and approved of by the purchaser; and that, even where the contract contains a specification of the dimensions and other particulars of the thing, and fixes

the precise mode and time of payment by months and days. The reason is that the maker or builder is not bound to deliver to the purchaser the identical thing which is in progress, but may, if he please, dispose of that to some other person, and deliver to the purchaser another vessel or thing, provided it answers to the specification contained in the contract. Per *Williams, J.*, 4 Ad. & Ell. 466. And see *Mucklow v. Mangles*, 1 Taunt. 318; *Goode v. Langley*, 7 B. & C. 26; *Atkinson v. Bell*, 8 B. & C. 277; 2 M. & R. 301; *Laidler v. Burlinson*, 2 M. & W. 602; *Tripp v. Armitage*, 4 M. & W. 687.

Although, however, a mere contract for the making of a chattel to order does not, *per se*, vest in the person giving the order the property in the chattel when completed, nevertheless if there be an appropriation and setting apart of the chattel on the one side, and an assent to such appropriation on the other side, that will pass the property in the article made to order, as clearly as it would have done had it been in existence at the time of the original contract, (*Wilkins v. Bromshead*, 7 Scott, N. R. 921), although subsequent additions have been ordered to be made to the article, after its completion according to the original order. *Carruthers v. Payne*, 2 M. & P. 441; see also *Elliott v. Pybus*, 4 M. & Sc. 289, 10 Bing. 512.

So where the intention is, either expressed or to be inferred from the attendant circumstances,

that the property shall pass in the incomplete and growing chattel as the manufacture of it proceeds, that intention will be effectuated. See *Woods v. Russell*, 5 B. & Ald. 942; *Reid v. Fairbanks*, 13 C. B. 692. Upon this principle, where a contract provides that a thing shall be made, or vessel built under the superintendence of a person appointed by the purchaser, and also fixes the payment by instalments, regulated by particular stages in the progress of the work, the general property in all the things used in the progress of the work vests in the purchaser at the time when they are put into the fabric, under the approval of the superintendent, or as soon as the first instalment is paid. *Clarke v. Spence*, 4 Ad. & Ell. 448, 466; and see *Wood v. Bell*, 5 Ell. & Bl. 772; 6 Ell. & Bl. 355.

A mere license in such a contract, for the purchaser in the event of the contractor not completing his work in a particular time, to use such of the materials of the contractor as shall be applicable to that purpose, will not, on the happening of that event, give the purchaser any property in such materials. *Baker v. Gray*, 17 C. B. 462.

A grant of goods which do not at the time belong to the grantor, but which he expects to acquire, will at law pass no property in them. *Robinson v. Macdonnell*, 5 M. & Selw. 228; *Lunn v. Thornton*, 1 C. B. 379; *Gale v. Burnell*, 7 Q. B. 850; *Hope v. Hayley*, 5 Ell. & Bl. 880. Such an assign-

ment is valid in equity, as, for instance, the assignment of the future cargo or freight of a ship will be made available in equity. See *In re Ship Warre*, 8 Price, 269, n.; *Curtis v. Auber*, 1 J. & W. 826; *Douglas v. Russell*, 4 Sim. 524; S. C. 1 My. & K. 488; *Langton v. Horton*, 3 Beav. 464; 1 Hare, 549.

When the parties, by their contract, make any condition precedent to the vesting of the property the subject of the contract, their intention will be carried into effect. If, for instance, goods are sent for sale "on approval or return," no property will vest in the purchaser until he has intimated his approval, because such was the intention of the parties. See *Swain v. Shepherd*, 1 M. & Rob. 223, Com. Dig. Condition (B. 3).

On fulfilment, however, of the condition the property will pass at once. Thus in *Evans v. Thomas*, Cro. Jac. 172, it is said, "If one covenants with another, that if he will marry his daughter he shall have such a flock of sheep. He marries his daughter, the property of the sheep was presently in him, for it was but a personal thing, and the covenant is as a grant." See also *Barrow v. Coles*, 3 Campb. 92.

Upon the same principle, where goods are delivered "on sale or return," and they are not returned by the purchaser within a reasonable time, the sale of the goods becomes absolute, because it will be presumed that he has fulfilled the condition precedent by accepting them. *Moss v. Sweet*, 16 Q. B. 493.

In the period intervening be-

tween the making of the contract and the performance of the condition, a *bond fide* purchaser may acquire an interest in the chattel, of which the first purchaser (whose remedy will be only against the vendee for a breach of contract) cannot deprive him. *Mires v. Solebay*, 2 Mod. 243.

In certain cases, although the property in goods may not have passed, the persons in whose possession they are, may, by their admissions to another, estop themselves from disputing his title. Thus in *Stonard v. Dunkin*, 2 Campb. 344, Knight gave the defendants, who were warehousemen, an order to hold some malt on the plaintiff's account, and the defendants thereupon gave a written acknowledgment that they held it on the plaintiff's account. The plaintiff had advanced £7,500 to Knight, for which the malt was to be a security. Knight became bankrupt, and in an action of trover for the malt, the question was whether the plaintiff or the assignees of Knight were entitled to the malt. It was contended for the defendants, that the malt passed to the assignees under the commission, inasmuch as from the universal usage and consent of the trade, *re-measuring* was necessary to a transfer of property in articles of this nature, and the bankruptcy took place before the malt in question was re-measured. Lord *Ellenborough* however said, "Whatever the rule may be as between the buyer and seller, it is clear the defendants cannot say to the plain-

tiff, 'the malt is not yours,' after acknowledging to hold it on his account. By so doing they attorned to him; and I should entirely overset the security of mercantile dealings, were I now to suffer them to contest his title."

A verbal acknowledgment is equally binding upon the warehouseman. Thus in *Gosling v. Birnie*, 7 Bing. 339, Ross contracted to sell some timber to Allum, who paid him part of the price on account, and the timber was sent to the defendant's wharf, who was apprised that it was sold to Allum, who marked the whole with the letter A. Ross afterwards gave Allum notice that unless he paid him the whole of his demand the timber should be resold. Ross afterwards sold the timber to the plaintiff, and gave a written order to the defendant to deliver it on receiving a sum of money for cartage. The defendant, on receiving the written order and the money for cartage, said, "Very well, I will hold the timber for you." Sometime afterwards he told the sawyers that the timber belonged to the plaintiff and not to Allum. Afterwards Allum, not knowing of the transfer to the plaintiff, paid the balance of the price of the timber into a bank to Ross's account, and the defendant gave him possession of the timber. The plaintiff thereupon brought an action of trover against the defendant, and the defence was, that the timber belonged to Allum to whom it had been first sold. The Court of Common Pleas, without deciding in whom

the property in the timber vested, held that the defendant could not dispute the plaintiff's title. "This," said *Tindal*, C.J., "is an action of trover, in which I agree that the question is, whether the plaintiff can show the property to be in himself: as to which, in the present case, the defendant is estopped by his own admissions; for, unless they amount to an estoppel, the word estoppel may as well be blotted out from the law. . . . The only question is, whether after what he has done, the defendant can set up the title of a third person, which is the less allowable, because at the time he made the admissions, he was fully acquainted with the claim of Allum. The plaintiff having relied on these expressions, was entitled to suppose that the defendant kept the timber for him." See also *Hawes v. Watson*, 2 B. & C. 540; *Gillett v. Hill*, 2 C. & M. 530; *Douglas v. Watson*, 17 C. B. 685.

It may be here mentioned, that in order to transfer a chattel by gift, there must either be a deed or instrument of gift, or there must be an actual delivery of the thing to the donee. *Irons v. Smallpiece*, 2 B. & Ald. 551, 552. And so essential has delivery been held, that a mere verbal gift of a chattel to a person in whose possession it is, will not pass any property to the donee. *Shower v. Pick*, 4 Exch. 478.

In equity a voluntary transfer or assignment in order to be effectual must be complete, but the donor may without any delivery

and while retaining the legal ownership, constitute himself a trustee for the donee. See note to *Ellison v. Ellison*, 1 Lead. Cas. Eq. 208, 2nd edit.

The question sometimes arises how far the vendor is able to rescind a contract of sale, so as to revest the property in himself. It is laid down as a rule in an old case, "that if the vendee does not come and pay and take the goods, the vendor ought to go and request him; and then if he does not come and pay and take away the goods in convenient time, the agreement is dissolved, and he is at liberty to sell them to any other person." *Langfort v. Tiler*, 1 Salk. 113. And see *Hinde v. Whitehouse*, 7 East, 571.

Whether this would be considered to be good law at the present day is perhaps doubtful; it seems clear, however, that where the property in goods has by the contract passed from the vendor to the purchaser, the former will not be able to rescind the contract so as to revest the property in himself, upon mere non-payment of the price at the stipulated time. Thus in *Martindale v. Smith*, 1 Q. B. 389, the defendant sold the plaintiff six stacks of oats then standing on his ground under the following written contract:—"April 23rd, 1838. Sold to Mr. John Martindale, of Catterlen, six oat stacks for £85.

"John Smith gives John Martindale liberty to let the stacks stand, if he thinks fit, until the middle of August next; and John Martin-

dale to pay John Smith for the stacks in twelve weeks from the date hereof."

The defendant at the end of twelve weeks called on the plaintiff to pay, which he did not do. After the expiration of the twelve weeks the plaintiff tendered payment, which the defendant refused to accept, and sold the oats, on which the plaintiff brought trover, and it was held by the Court of Queen's Bench that he was entitled to recover. "Having taken time," said Lord Denman, C.J., "to consider of our judgment owing to the doubt excited by a most ingenious argument, whether the vendor had not a right to treat the sale at an end, and reinvest the property in himself by reason of the vendee's failure to pay the price at the appointed time, we are clearly of opinion that he had no such right, and that the action is well brought against him. For the sale of a specific chattel on credit, though that credit may be limited to a definite period, transfers the property in the goods to the vendee, giving the vendor a right of action for the price, and a lien upon the goods, if they remain in his possession till that price be paid. But that default of payment does not rescind the contract. Such is the doctrine cited by *Holroyd, J.*, from Com. Dig. Agreement (B. 3), in *Turling v. Baxter* (6 B. & C. 360, 362, and *ante*, p. 501), with all the numerous cases referred to in the course of the argument Pothier in his *Traité du Contrat de Vente* (part v. ch. 2, s. 6, art. 475)

cites the Civil Code (Cod. lib. iv. tit. 44, s. 14) for the proposition, that a purchaser's delay in paying the price does not give the vendor a right to require a dissolution of the contract; he can only exact by legal procedure the payment of the price due to him. "*Non ex eo, quod emptor non satis conventioni fecit, contractus irritus constituitur.*" Cod. lib. iv. tit. 44, s. 14. He adds, however, that from the difficulty of enforcing payment from debtors, the French law had departed from the rigour of these principles, permitting a suit for the dissolution of the contract for default of payment. The judge then appointed a more distant day; which passed, and no payment made, the vendor was permitted to resume possession of the thing sold. But even after sentence of dissolution, the purchaser may prevent that effect, and keep what he has bought, by appealing, and offering, on that appeal, the price which he owes with interest and expenses. The vendor's right, therefore, to detain the thing sold against the purchaser, must be considered as a right of him till the price is paid, not a right to rescind the bargain. And here the lien was gone by tender of the price."

But although in a sale of chattels time is not of the essence of the contract, unless it is made so by express agreement, that may be easily done by introducing conditional words into the bargain. Per Lord Denman, C.J., in *Martindale v. Smith*, 1 Q. B. 395.

Where goods are sold on con-

dition that, if they are not paid for at a time specified, the owner may resell them, and the vendee shall be answerable for any loss on resale, such sale is conditional and not absolute. If, therefore, the vendee do not pay at the time, and the vendor resell at a loss, he cannot maintain assumpsit for goods

bargained and sold, or goods sold and delivered. *Lamond v. Davall*, 9 Q. B. 1080.

A contract can of course be rescinded, as well as entered into, by the mutual consent of the parties to it. *Heinekey v. Earle*, 8 Ell. & Bl. 422; see also *Douglas v. Watson*, 17 C. B. 685.

WISEMAN v. VANDEPUTT.

De Term. S. Hill, Jan. 27th, March 21st, 1690.

[REPORTED 2 VERN. 203; S. C. 1 EQ. CA. ABR. 56, PL. 2.]

STOPPAGE IN TRANSITU.]—*A. being beyond sea, consigns goods to B., then in good circumstances in London, but before the goods arrive B. becomes a bankrupt. If A. can by any means prevent the goods coming into the hands of B. or the assignees, it is allowable in equity, and B. or the assignees shall have no relief in equity.*

The plaintiffs, being assignees under a statute of bankruptcy taken out against the Bonnells, brought their bill for a discovery and relief, touching two cases of silk at first consigned by Altoniti and Antinori to the Bonnells, then considerable merchants in London; but before the ship set sail from Leghorn, news came that the Bonnells had failed, and thereupon Altoniti and Antinori alter the consignment of the silks, and consign them to the defendant.

Upon the first hearing, the Court ordered all letters, papers, etc., to be produced, and that the parties proceed to a trial in trover, to see whether the first consignment, notwithstanding the altering thereof, and new consignment made before the ship sailed, vested the property of those silks in the Bonnells; and upon the trial, the verdict being given for the plaintiffs, the cause now came on upon the equity reserved.

The Court declared the plaintiffs ought not to have had so much as a discovery, much less any relief in this Court, and ordered the cause to be heard *ab origine* (Reg. Lib. 1690, B. 221, 27th January), in regard that the silks were the proper goods of the two Florentines, and not of the Bonnells, nor the produce of their effects; and therefore they having paid no money for the goods, if the Italians could by any means get their goods again into their hands, or prevent their coming into the hands of the bankrupts, it was but lawful for them so to do, and very allowable in equity.

And it was so ruled in the like case between *Wigfall* and *Motteux*, etc., and lately between *Hitchcox* and *Sedgwick*, in case of a purchase, without notice of bankruptcy; therefore decreed an account, if anything due from the Italians to the Bonnells, that should be paid the plaintiffs, but they should not have the value of the silks by virtue of the consignment or verdict, and put the Italians to come in as creditors under the Statute of Bankrupts.

WHITEHEAD AND OTHERS, ASSIGNEES OF RICHARD BENBOW, A BANKRUPT, v. ANDERSON AND OTHERS.

Hilary Term, 5 Vict., Jan. 31st, 1842.

[REPORTED 9 MEES. & WELSB. 518.]

STOPPAGE IN TRANSITU.]—*A notice of stoppage in transitu to be effectual, must be given either to the person who has the immediate custody of the goods, or to the principal whose servant has the custody at such a time, and under such circumstances as that he may, by the exercise of reasonable diligence, communicate it to his servant in time to prevent the delivery to the consignee. Therefore where timber was sent from Quebec, to be delivered at Port Fleetwood in Lancashire, a notice of stoppage given to the ship-owner at Montrose, while the goods were on their voyage, whereupon he sent a letter to await the arrival of the captain at Fleetwood, directing him to deliver the cargo to the agents of the vendor, was held not to be a sufficient notice of stoppage in transitu.*

The vessel arrived in port on the 8th of August; on which day, before the captain had received his owner's letter, the agent of the assignees of the vendee (who had become bankrupt) went on board, and told the captain he had come to take possession of the cargo. He went into the cabin, into which the ends of the timber projected, and saw and touched the timber. When the agent first stated that he came to take possession, the captain made no reply, but subsequently, at the same interview, told him that he would deliver him the cargo when he was satisfied about his freight. They then went on shore together. Shortly afterwards the agent

of the vendor came on board, and served a notice of stoppage in transitu upon the mate, who had charge of the cargo, and in a few days after received possession of the cargo from the captain. Held, that under these circumstances there was no actual possession taken of the goods by the assignees; and as there was no contract by the captain to hold the goods as their agent, the circumstances did not amount to a constructive possession of the goods by them.

Quære whether the act of marking or taking samples or the like, without any removal of any part of the goods from the possession of the carrier, even though done with the intention of taking possession, will amount to a constructive possession, unless accompanied by circumstances denoting that the carrier was intended to keep, and assented to keep, possession of the goods as the agent of the vendee?

Before the consignor knew of the bankruptcy of the consignee he had sent three letters to the manager of a bank in Liverpool, inclosing bills drawn by himself upon certain parties, and he referred them to the defendants as persons who would settle any irregularity that might occur respecting the acceptances. These letters were communicated to the defendants, and assented to by them. Another letter to the same party enclosed a bill drawn upon the consignee for the price of the timber in question. Held, that the letters were admissible in evidence, and were some evidence to show an authority in the defendants to stop the cargo in transitu.

The consignor before the stoppage in transitu wrote a letter to the defendants, in which he assumed that they had stopped the cargo, and gave directions as to the sale of it. This letter did not reach the defendants until after the stoppage. Quære, whether it gave authority to them to stop the cargo at the time of the stoppage, or amounted to a valid ratification of that act.

Trover for timber, alleging the possession by the plaintiffs as assignees, and a conversion by the defendants after the bankruptcy. Pleas: first, not guilty; secondly, a denial of the plaintiffs' possession of the goods. All points as to any right of stoppage *in transitu* was to be raised upon the first and second pleas.

At the trial, at the Liverpool Spring Assizes, 1844, a verdict was found by consent for the plaintiffs,—damages £2,000, subject to a special case for the opinion of this Court, to be stated and settled by a barrister; wherein it was agreed, that if the opinion of the Court should be in favour of the defendants, then the verdict so

found for the plaintiffs should be set aside, and a verdict entered for the defendants; but if the opinion of the Court should be in favour of the plaintiffs, then that the damages should be subject to reduction, according to the finding of the barrister.

Richard Benbow, before his bankruptcy, was a timber-merchant at Liverpool, and on the 12th of March, 1840, contracted with Charles Birnie, owner of the ship 'Monarch,' that the ship should proceed to Quebec, and there load a full cargo of timber; and should proceed therewith to Wyrewater, otherwise called Port Fleetwood, in the county of Lancaster, and deliver the same, on being paid freight for the timber at a certain rate. It was also agreed that the ship should be consigned to Thomas Benbow, of Wyrewater, the brother of Richard Benbow.

On the 1st of April, 1840, R. Benbow contracted with George Burnes Symes, a merchant at Quebec, then at Liverpool, for a cargo of timber for the 'Monarch,' to be shipped at Quebec, and to be paid for by the purchaser's acceptance of the seller's draft at ninety days; and on the 25th of June the 'Monarch' sailed with the cargo. On the 1st of July, 1840, Symes wrote a letter to John Chaffers, the manager of the Royal Bank in Liverpool, with which bank Symes had an account, inclosing in the letter a bill of exchange, drawn by him on R. Benbow, for £533. 8s. 6d., the price of the 'Monarch's' cargo.

On the 27th of June, 1840, a fiat of bankruptcy issued against Benbow, founded on an act of bankruptcy committed on the 26th of June, 1840, and he was duly declared a bankrupt, and the plaintiffs were, on the 8th of July, 1840, appointed his assignees.

On the 9th of July Mr. Birnie, the owner of the 'Monarch,' having heard some rumours affecting the credit of R. Benbow, wrote from Montrose a letter to the captain of the 'Monarch,' stating the rumours, and requesting the captain to intimate to Thomas Benbow that, before the delivery of the cargo, he, T. Benbow, must produce approved security. The plaintiffs directed T. Benbow to take charge of the cargo of the 'Monarch' for the assignees, on her arrival at Wyrewater. The bill drawn by Symes on Benbow for the price of the cargo was not accepted, and has not been paid.

The defendants, who are merchants at Liverpool, are correspondents of Symes, and on the 18th of July, 1840, despatched Richard Grindley, one of their clerks, to Wyrewater, with instructions to go on board the 'Monarch' on her arrival there, to serve

the notice of stoppage *in transitu* on the master. The defendants also wrote a letter from Liverpool, on the 18th of July, to Birnie, in consequence of the receipt of which Birnie, on the 20th of July, wrote a letter to the captain, apprising him of the failure of Benbow, and appointing Grindley, or Mr. Lewtas, of Garstang, near Wyrewater, to take charge of the cargo.

The 'Monarch' arrived at Wyrewater between seven and eight o'clock on Saturday evening, the 8th of August, 1840. As she was entering the harbour T. Benbow saw her, and having hailed the captain and ascertained her name, took a boat to go on board. The vessel let go her anchor, and he got on board about eight o'clock P.M., as the crew were furling the sails. The 'Monarch' was then at the usual anchoring and discharging ground, opposite to the custom-house, and there came to anchor with a single anchor, at the spot where her cargo was subsequently discharged; but in such a tideway as there is at Wyrewater, it was necessary that the vessel should be moored with a second anchor, in order to discharge in safety, and the second anchor was not in fact got out until four o'clock next morning, the 9th of August, until which time the pilot remained on board in charge of the vessel. Thomas Benbow so went on board the 'Monarch' for the purpose of taking possession of the cargo, and told the captain that the ship was consigned to him by the charter-party, and that he had come to take possession of the cargo. He told the captain that he, Benbow, had got the bill of lading, but he did not produce it. The captain invited Thomas Benbow into the cabin. The bulkheads of the cabin had been removed, as is usual in timber vessels, and the ends of the timber, part of the cargo, projected into the cabin, and Thomas Benbow saw and touched them. When Thomas Benbow first stated that he came to take possession, the captain made no reply; but he subsequently at the interview told Thomas Benbow that he would deliver him the cargo when he was satisfied about the freight; and he did not, at this interview, consent to deliver immediate possession, or to waive his lien on the cargo for the freight. Thomas Benbow offered to advance the captain any money he might want; the captain said he would require money for various purposes, and that he expected a letter from his owner; and he then accompanied Thomas Benbow ashore. At this time the captain received his owner's letter of the 9th of July. T. Benbow, at the same time, advanced him £40 on account of freight, to be applied by the captain for the disbursements of the ship. At this time T. Benbow

had not informed the captain, nor had the captain any knowledge of the bankruptcy of R. Benbow; and this payment being only a partial satisfaction on account of the freight, did not alter the captain's intention to withhold his consent to deliver the cargo until he was satisfied for the whole of the freight.

Grindley, the defendant's clerk, on the same 8th of August, got on board the 'Monarch' about half an hour after the captain had gone on shore with T. Benbow. He there told the mate that the consignees had failed, and that he had come to prevent the cargo falling into their hands. He then delivered to the mate the notice, stating that it was intended for the stoppage *in transitu* of the cargo. Grindley then went on shore, and delivered to the captain the letter of the ship-owner of the 20th of July, whereupon the captain promised and consented to deliver the cargo to Grindley. The following day the captain tendered to T. Benbow the £40 that he had received from him; but the latter declined to receive it. The cargo was afterwards entered at the custom-house by Benbow, and the captain consented to deliver the cargo to him. This entry, however, was not acted on; and it was subsequently entered by Grindley, to whom the captain again promised to deliver it. Part of the timber was afterwards put over the ship's side, and delivered to Grindley; Benbow, who was present, making claim to, and demanding possession of it. The rest of the cargo was also subsequently delivered to Grindley. The 'Monarch' never moved from the place where she first came to single anchor, and where Benbow first got on board, until after the delivery of the cargo was completed.

It has been already stated, that the defendants were agents for Symes; but the extent of their authority as agents was disputed. Part of the evidence tendered to show such a general authority from Symes as would warrant the defendants in stopping this cargo *in transitu*, consisted of letters written by Symes on the 27th of May, the 28th of May, and the 12th of June, 1840, to Mr. Chaffers, the manager of the Royal Bank of Liverpool, which letters had been received, communicated to the defendants, and had been assented to by them, before they interfered to stop *in transitu*, as stated in the present case. In these three letters, which enclosed bills drawn by Symes on the various parties, and which he directed Chaffers to forward for acceptance, he stated that if any irregularity or informality should occur respecting them, the defendants would assist in getting them in order. There was also a letter of the 1st of July, 1840, written by Symes to Chaffers, in which he enclosed

a bill drawn by him on the bankrupt, Richard Benbow, for the amount of the cargo in question, and requested Chaffers to get it accepted. The admissibility of all these letters was objected to. If these letters or any of them are admissible, and are any evidence to show such general authority, they together with the other evidence given suffice to prove such general authority; and it must be assumed as a fact in the case, that the defendants had authority from Symes to stop this cargo *in transitu*, before they took any steps for that purpose. If these letters are not any evidence to prove such authority, then it must be assumed that the defendants had no authority from Symes to stop the cargo *in transitu*, when they interfered for that purpose, unless such authority was conveyed by the letter next hereinafter mentioned.

On the 24th of July, 1840, Symes wrote a letter to the defendants, in which he assumes that they have taken possession of the cargo, and sold it on his account. This letter was posted on the 24th of July, 1840, and received by the defendants in Liverpool on the 15th of August, 1840. If this letter could give the defendants authority from Symes to stop this cargo *in transitu* at the time they interfered for that purpose, it must be taken that they then had such authority. If this effect cannot be legally attributed to this letter, Symes by it ratified and confirmed all that was done by the defendants to stop this cargo *in transitu* and take possession of it.

If the Court should be of opinion that the plaintiffs are entitled to recover, the verdict is to be entered for them,—damages £460; but if the Court should be of opinion in favour of the defendants, then the verdict found for the plaintiff is to be set aside, and a verdict entered for the defendants.

The case was argued at the sittings after last Michaelmas Term (November 27), by *Crompton*, for the plaintiffs.—First, the notice given by the defendants to Birnie, the shipowner, by the letter of the 18th July, did not amount to a stoppage *in transitu*, not being directed to the party who had possession of the goods, and could act upon it. Could a notice given to an owner, residing in Canada or in the East Indies, operate to stop *in transitu* goods on their way to England? To have that effect, it ought to be given to the captain, or at all events to the owner, within such reasonable time and distance that he may communicate with the captain. [*Parke, B.*—Suppose it were a case of carriage by land; would a notice to Pickford's in London be sufficient, or must it be given to the

carrier on the road?'] A notice to them might be sufficient, if given in time for them to write and stop the goods. The test is, whether the party receiving the notice would be liable in trover as for a conversion by non-delivery of the goods pursuant to the notice. [*Parke, B.*—Then in the case of a ship at sea, there must always be a sort of race, and the vendor must take the chance of the consignee's first reaching the port of the discharge.] The notice ought surely to be given to the person who can act upon it at the time; otherwise parties who may have assumed the possession, and acted as owners of the goods, and their rights may afterwards be divested by a communication coming from the owner abroad, of a notice of stoppage given to him. The rule of law used to be, that a stoppage *in transitu* could be effected only by the corporal touch of the goods, but that undoubtedly is now otherwise: *Lett v. Cowley* (7 Taunt. 169). But in that case trover would have lain against the carrier for not delivering the goods accordingly; but not so here, unless laches were shown, or it appeared that the shipowner could have acted on the notice in time. If the defendants had gone to him at Montrose, and there demanded the goods, his refusal to deliver them would clearly not have amounted to a conversion.

Secondly, the goods came to the possession of the assignees on the 8th of August, before any act of stoppage *in transitu*. On that day their agent went on board, declaring his intention to take possession, and had actual corporal touch of the goods; and the captain agreed to hold the goods for them, and attorned to their title, for he promised to deliver them on payment of certain freight, which was afterwards paid accordingly. He became thenceforward the agent of the plaintiffs, to hold the goods for them. In *Crawshay v. Eades* (1 B. & C. 181; 2 D. & R. 228), which may be cited for the defendants, the carrier had not delivered the property to the consignee, nor agreed to hold it for him, but expressly retained it by way of lien for his freight. There was in that case nothing to amount to an attornment by the bailee in possession of the goods. In *Hawes v. Watson* (2 B. & C. 540; 4 D. & R. 22), it was held, that an attornment by a warehouseman to the title of the vendee, subject to the payment of warehouse rent and charges, put an end to the right of stoppage. So in *Gosling v. Birnie* (7 Bing. 339; 5 M. & P. 160), where a wharfinger had agreed to hold timber on his wharf for the plaintiff, a vendee, he was held liable in trover for the value, notwithstanding his claim for wharfage. These cases show that the continuance of the carrier's lien does not prevent the right

of stoppage *in transitu*. *Allan v. Gripper* (2 C. & J. 218) and *Rowe v. Pickford* (8 Taunt. 83) are authorities to the same effect. If it were otherwise, the right of stoppage never would be gone in cases where the goods are held by warehousemen or wharfingers as agents for the vendee, for in all such cases there is an existing lien. Then as to the mode of taking possession, *Ellis v. Hunt* (3 T. R. 464) is an authority to show that it was sufficient in this case. There possession taken by the consignee's putting his mark upon the goods in the carrier's warehouse was held sufficient. The present case is stronger; here the plaintiffs, by their agent, had actual touch of the goods, and had the carrier's assent to hold for them. More could not have been done; for the goods were to be delivered afloat. In *Jackson v. Nichol* (5 Bing. N. C. 508; 7 Scott, 577), where the right of stoppage was held to be undetermined, there was a mere *demand* by the vendee, without any delivery; and the holder had refused to deliver the goods. Here they had come to their ultimate destination, and the captain had agreed to hold them for the benefit of the plaintiffs; and all that was afterwards done by Grindley on behalf of the vendors could not affect the previous transaction of the 8th of August.

But, thirdly, the defendants had no sufficient authority to stop the goods *in transitu*. The letters prove no *prior* authority, and a subsequent ratification is not sufficient for such a purpose. [The learned counsel read the letters stated in the case.] The letter from Symes of the 24th July, although written before the stoppage, was not communicated to the defendants until after that event, and therefore cannot be considered as having authorized them to stop the cargo. [Alderson B.—Can you say the letters are not *some evidence* towards proving a general authority? and if they are, the fact is found that the defendants had such authority.] It is submitted that they are not evidence at all. The other letters refer to other transactions, and have no relevancy to this issue. They amount at most to evidence of a special authority, to interfere with respect to the bills mentioned in them. And with respect to that of the 24th of July, it can only be regarded as a subsequent ratification of the defendant's act, which is not sufficient. In *Nicholls v. Le Fewre* (2 Bing. N. C. 81) the Court appeared to doubt whether a stoppage *in transitu* made by an unauthorized party could afterwards be ratified. See also *Siffkins v. Wray* (6 East, 371). A subsequent ratification cannot be equivalent to a previous authority, where the rights or estates of third parties are to be

affected thereby. In this case, if it were sufficient, the captain would be made a wrongdoer by relation, and the assignees would be left in an uncertainty whether they had a right to the possession or not. On the same principle, a recognition of a notice to quit, given by an authorized person after it has begun to run, is ineffectual. *Right v. Cuthell* (5 East, 491), *Doe d. Mann v. Walters* (10 B. & C. 626; 5 Man. & R. 357). The law is laid down in accordance with this distinction in Story on Agency, 208, 209; and Paley's Principal and Agent, 345, 346 (3rd edit.).

Cresswell for the defendants.—In the first place, the letters are amply sufficient to show an authority given to the defendants to exercise the right of stoppage *in transitu* on behalf of the vendors. They are obviously the same for this purpose as if they had been addressed to the defendants themselves, having been communicated to and assented to by them. They are not merely *admissible*, but the *best* evidence for the purpose; and they clearly tend to show a general authority to act on behalf of the vendors, in all cases with relation to unpaid bills which should render such interference necessary. And the finding in the case is express, that if the letters are admissible, and are any evidence to show such general authority, they suffice, with the other evidence in the case, to prove it. But further, the letter of the 24th of July, which was written before the stoppage, is no mere act of *ratification*; it professes to *confer* an authority, and takes effect from its date. It is in this respect like a power of attorney, which would become operative from the period of its execution and delivery, though it might not come into the agent's hands until after he had done the act authorized by it. But even if this be not so, it is as good as a ratification of the acts of the defendants. This case differs essentially from those which have been cited, of unauthorized notices to quit afterwards ratified. There a party is called upon to give up a right, or his position is sought to be altered, by force of a document which, at the time, gives him no countervailing protection, for the tenant would remain liable to the rent, notwithstanding the receipt of the unauthorized notice. The same doctrine may perhaps apply as between the principal and the *carrier*, with relation to the stoppage of goods *in transitu*; and if this were an action by the vendees against the carrier for delivering the goods to the buyers notwithstanding this notice, it might not be sufficient; but the case is different as between these parties. In *Bailey v. Culverwell* (8 B. & C. 448; 2 Man. & R. 564), the general doctrine that the ratification of an

act done for the benefit of the party is equivalent to a previous authority was distinctly recognized, and has never been disputed, except in the instances falling within the principle stated in *Right v. Cuthell*. The same law is broadly laid down in *Whitehead v. Taylor* (10 Ad. & Ell. 210; 2 P. & D. 367).

Secondly, there was in fact a sufficient stoppage *in transitu*.

According to *Litt v. Cowley*, the letter to Birnie of the 18th of July, if not *per se*, yet coupled with his consequent letter to the captain, was a sufficient exercise of the right of stoppage. In *Litt v. Cowley* the goods were delivered to Pickford and Co. at Manchester; before they arrived at London, notice of stoppage was served on Pickford and Co. in Manchester; and that was held sufficient. It is said the notice in this case was insufficient, because it did not come to the hand of the captain in time, and he did not act upon it; the same fact existed and the same argument might have been used in the case of *Litt v. Cowley*. Birnie, who is the *carrier*, assents to stop the goods, and communicates that intention to the master, who then has the goods in his possession, as his servant. That is a sufficient act of stoppage.

Thirdly, there was no such previous delivery of the cargo as could defeat the right of stoppage *in transitu* on the 8th of August. The voyage was not ended at the time when the agent of the assignees came on board, for the ship was not so moored as to be ready for the delivery of the cargo. And it clearly never was in the contemplation of the parties that the ship should be the warehouse of the purchaser for the deposit of the goods. There is no agreement on the part of the captain to give up the goods *on board the ship*, but only that the assignees should receive them afloat, at the usual place of mooring. The question then comes to this, was there an *intention to deliver* the cargo, or a delivery in fact? In *Crawshay v. Eades* the delivery on the wharf would *prima facie* have appeared to be a delivery to the purchaser, but the Court held that it could not be so construed, because there the party could not have intended to part with his lien. So the purchaser's act of marking the goods does not of itself import a delivery. [Parke, B.—No, the question is *quo animo* the act is done. My notion has always been, that the question is whether the consignee has *taken possession*, not whether the captain has *intended to deliver* it.] Suppose he refuses to deliver, can the consignee take possession *in invitum*? [Parke, B.—Yes, subject to his lien. In *Ellis v. Hunt* and *Rowe v. Pickford* there was no intention on the part of

the carrier to deliver, so as to divest his lien.] But there was no intention to withhold the possession—no *adverse demand* of lien. Those cases proceeded on the ground of the place being treated as the warehouse of the purchaser, and the contemplated end of the *transitus*. But further, here there was no actual delivery or taking possession of the goods. There was no assent to their immediate delivery, nor is it said that the agent touched them with intent thereby to take possession; his doing so might be merely accidental. There was no such taking possession as would have imposed upon the assignees the duty of taking the cargo out of the vessel. The cases as to an attornment are of quite a different character, and amount to this only, that, as between the warehouseman and a second purchaser, the former is estopped by the entry and transfer in his books; such are *Hawes v. Watson* and *Gosling v. Birnie*; but in such cases the rights of the original vendor remain unaffected. A *symbolical* taking of possession cannot be made operative, and equivalent to actual possession, without the consent of both parties. Suppose the captain had received authority to stop *in transitu*, could this transaction have prevented it? It clearly amounts to no more than *evidence* of possession, which is rebutted by the other circumstances of the case. *Dixon v. Yates* (5 B. & Ad. 313) shows that the whole question, whether there has been a delivery or not, depends on the intention of the parties. Here the captain shows his intention, by refusing to deliver till the freight is paid; he merely promises to deliver *in futuro*, on being satisfied as to the freight, and enters into no engagement to hold for the vendees in the meantime.

Crompton, in reply.—First, no sufficient authority in the defendants is found for the Court to act upon it. [*Parke*, B.—Surely every evidence of a special is evidence of a general authority. *Alderson*, B.—The letters are not admissible, because not relevant *otherwise* than as showing a general authority; but surely they are some evidence of that.] The letter of the 24th of July could give no authority, except from the time when it was received. [*Alderson*, B.—That question is material only in case the other letters are inadmissible; and the Court have little doubt that they are admissible.]

Secondly, the letter to Birnie, even coupled with his letter thereupon to the captain, was no sufficient stoppage *in transitu*. Birnie never communicated his assent *to the defendants*. No doubt, his letter to the captain would have been a sufficient authority to *him* to stop, if he had received it before the 8th of August.

Those letters would not have been sufficient evidence to make Birnie liable in trover, if the captain had delivered the goods to the assignees. In *Litt v. Cowley*, the facts established that the carriers had the immediate power of doing the act necessary to the stoppage.

Thirdly, there was a sufficient taking of possession by the assignees. It is argued that there was no *intention* on the part of the captain to *deliver*, but that was immaterial. What it is necessary to prove is, either that *actual possession* has been taken, or that the master has become the agent of the vendee, to hold for him; and in this case there was evidence of such agency. It is strictly a case of estoppel, by attornment of the master to the title of the assignees.

Cur. adv. vult.

The judgment of the Court was now delivered by

PARKE, B.—The question for our decision in this case is, whether the unpaid vendor of a cargo of timber legally stopped it *in transitu*, before the transitus was at an end.

The material facts may be stated in a few words:—Benbow, a merchant of Liverpool, ordered a cargo of timber of Symes, a merchant at Quebec, which was despatched from thence on board a ship belonging to Birnie, of Montrose, chartered by Benbow. The timber was deliverable at the port of Fleetwood, in Lancashire. The price was not paid; and before the arrival of the vessel in England, Benbow became bankrupt; thereupon the defendants, who were the correspondents of the vendor, gave, on the 18th of July, to Birnie, the owner, at Montrose, a notice of stoppage *in transitu*, on behalf of the vendor; and Birnie, on the 20th, wrote to the captain, directing him to hold the cargo at the disposal of the defendant's agents, and sent the letter to await the arrival of the vessel at Fleetwood. On the 8th of August, the captain arrived there with the vessel and cargo; but, on that evening, and before the receipt of the letter by the captain from his employer, an agent of the assignees of Benbow went on board to take possession of the cargo, and had a communication with the captain on the subject, and did certain acts on board, which are stated in the special case. The captain went on shore with the agent of the assignees, and soon after, on the same evening, the defendant's agent went on board the vessel, and delivered a notice of stoppage *in transitu* to the mate, who was left in charge of the cargo. Afterwards, the defendants got the actual possession of the cargo, and the plaintiffs, the assignees of Benbow, bring this action to recover it.

Upon these facts, the first question is, whether the notice given by the defendants to Birnie, on the 18th of July, was a sufficient stoppage *in transitu*; for if it was, the alleged taking possession of the cargo by the agent of the assignees of the purchaser was too late. We think it was not.

It being admitted by the plaintiffs that a notice to the carrier, on the part of the unpaid vendor, is generally a sufficient stoppage *in transitu*, two objections were taken to this notice; the one, that the defendants, the correspondents of the vendor, were not authorized by him to give it (and the same objection applies to every other act of the defendants which is put forward as a stoppage *in transitu*); and the other objection is, that the notice to the ship-owner, who had not himself personally the custody of the goods, was, under the circumstances of this case, insufficient.

Whether the defendants had authority to make a stoppage *in transitu* for the vendor, turns upon this point. Certain letters were offered in evidence, written and sent by Symes at a prior time from Quebec to a Mr. Chaffers, the manager of a bank at Liverpool, all referring to the defendants as persons who were to act for Symes in case any difficulty should arise, with respect to different bills of exchange mentioned in those letters, or to any others, (amongst which latter was a bill drawn by Symes in favour of Chaffers, on account of the very cargo of timber in question). All these letters had been communicated to and assented to by the defendants, before they interfered; and the special case, in which the facts were found by an arbitrator, states, that if those letters, or *any* of them, were admissible to show such a general authority as would warrant a stoppage *in transitu*, they, together with other evidence in the cause, were, in the judgment of the arbitrator, sufficient to prove it; and it must be assumed as a fact, that there was such an authority. We have no difficulty in saying, that the appointment of the defendants by Symes to act for him, with respect to *other* dishonoured bills, and particularly the bill for the cargo in question, is *some* evidence of a general authority to act for him, or at least an authority to take such steps as they should think fit for the purpose of securing those bills; and by implication, an authority to stop the cargo, for the price of which one of the bills was drawn. And if it be *any* evidence, the mode of stating the special case precludes any question (if there were any) as to its weight.

There is no doubt, therefore, of the authority of the defendants to make a stoppage *in transitu*.

The next question is, whether the notice to Birnie, the ship-owner, living at Montrose, given on the 20th of July, is such a stoppage of the cargo then being on the high seas on its passage to Fleetwood. We think it was not; but to *make* a notice effective as a stoppage *in transitu*, it must be given to the person who has the immediate custody of the goods; or, if given to the principal, whose servant has the custody, it must be given, as it was in the case of *Litt v. Cowley* (7 Taunt. 169), at such a time and under such circumstances, that the principal, by the exercise of reasonable diligence, may communicate it to his servant in time to prevent the delivery to the consignee; and to hold that a notice to a principal at a distance is sufficient to revest the property in the unpaid vendor, and render the principal liable in trover for a subsequent delivery by his servants to the vendee, when it was impossible, from the distance and want of means of communication, to prevent that delivery, would be the height of injustice. The only duty that can be imposed on the absent principal is, to use reasonable diligence to prevent the delivery; and in the present case such diligence was used.

The case, therefore, is resolved into this question, whether the circumstances which occurred on the evening of the 8th of August, when the agent of the assignees went on board, amounted to a taking possession, so as to determine the right to stop *in transitu*.

The law is clearly settled, that the unpaid vendor has a right to retake the goods before they have arrived at the destination originally contemplated by the purchaser, unless in the meantime they have come to the actual or constructive possession of the vendee. If the vendee take them out of the possession of the carrier into his own before their arrival, with or without the consent of the carrier, there seems to be no doubt that the transit would be at an end; though, in the case of the absence of the carrier's consent, it may be a wrong to him, for which he would have a right of action. This is a case of *actual* possession, which certainly did not occur in the present instance. A case of *constructive* possession is, where the carrier enters expressly, or by implication, into a new agreement, distinct from the original contract for carriage, to hold the goods for the consignee as his agent, not for the purpose of expediting them to the place of original destination, pursuant to that contract, but in a new character, for the purpose of custody on his account, and subject to some new or further order to be given to him.

It appears to us to be very doubtful, whether an act of marking

or taking samples, or the like, without any removal from the possession of the carrier, so as though done with the intention to take possession, would amount to a constructive possession, unless accompanied with such circumstances as to denote that the carrier was intended to keep, and assented to keep, the goods in the nature of an agent for custody. In the case of *Foster v. Frampton* (6 B. & C. 107; 9 D. & R. 108), it is clear that there were such circumstances. Whether in that of *Ellis v. Hunt* (7 T. R. 46) is doubtful; but it is unnecessary to determine this point, as there is no finding in this case even of any act done to the timber *with intent to take possession*. It is said, indeed, that the agent of the assignees touched the timber, but whether by accident or design is not stated. There being then no such act of ownership, it seems to us that unless, by contract with the captain, express or implied, the relation in which he stood before, as a mere instrument of conveyance to an appointed place of destination, was altered, he became the agent of the consignee for a new purpose, there was no constructive possession on the part of the vendee.

There is no proof of any such contract. A promise by the captain to the agent of the assignees is stated, but it is no more than a promise, without a new consideration, to fulfil the original contract, and deliver in due course to the consignee, on payment of freight, which leaves the captain in the same situation as before; after the agreement he remained a mere agent for expediting the cargo to its original destination.

We therefore think the transaction on the 8th of August did not amount to a constructive possession by the vendees, and therefore the defendants are entitled to our judgment.

Judgment for the defendants.

Although a vendor may actually have parted with the possession of goods, sold upon credit, nevertheless in case of the purchaser becoming bankrupt or insolvent, he may retake them, if he can do so before they get into the possession of the purchaser. This is called the vendor's right of stoppage *in transitu*,—a mercantile remedy of a most equitable character, for no-

thing would be more unjust than that such goods should be applied in payment of the purchaser's general creditors, and, as it has been tersely said by Lord Northington, C., "it has been determined on solid reasons, that the goods of one man should not be applied in payment of another's debts." *D'Aquila v. Lambert*, 2 Eden 77.

The history of the law relating to stoppage *in transitu* has been ably stated by Lord *Abinger* in the well-known case of *Gibson v. Carruthers* (8 M. & W. 337), which was decided in the year 1841. "Although," said his Lordship, "the question of stoppage *in transitu* has been as frequently raised as any other mercantile question within the last hundred years, it must be owned that the principle on which it depends has never been either settled or stated in a satisfactory manner.

"In courts of equity it has been a received opinion that it was founded on some principle of common law. In courts of law it is just as much the practice to call it a principle of equity, which the common law has adopted. This was strongly insisted upon by Mr. Justice *Buller* in his celebrated judgment in the House of Lords, in the case of *Lickbarrow v. Mason* (4 Bro. P.C. 57). It has also been said by Lord *Kenyon*, that it was a principle of equity adopted by the common law to answer the purposes of justice. The most eminent equity lawyers that I have had the opportunity of conversing with in times that have gone by, were unanimous in repudiating it as the offspring of a court of equity. The first case that occurred upon this subject affords some authority for the opinion of Mr. Justice *Buller* and Lord *Kenyon*. It is the case of *Wiseman v. Vandeputt* (2 Vern. 203), in 1690. The Lord Chancellor directed an action of trover to be brought by the plain-

tiffs upon which they recovered a verdict. It is clear, therefore, that the rule had not at that time been adopted at law. The Lord Chancellor, however, adopted it in equity, and, notwithstanding the verdict at law for the plaintiffs, made a decree against them. The next case is that of *Snee v. Prescott* (1 Atk. 245). Lord *Hardwicke* again applied the rule to a certain extent in equity. But it is remarkable that he received evidence of what was the custom of merchants on this point; and he expressly founds his decree upon the evidence of the custom of merchants, as well as upon the justice of the case. This decision occurred about the year 1742 or 1743. The next case is that of *Ex parte Wilkinson*, in 1755, referred to in *D'Aquila v. Lambert* (Amb. 399), which took place in 1761. There the Lord Chancellor again grounded his decree on the usage of merchants, and stated that the several previous decisions which had taken place to the same effect, had given great satisfaction to the merchants. Numerous cases have followed at law, showing that the right of stoppage *in transitu*, under certain circumstances, is now part of the common law.

"Nevertheless, owing perhaps to the doubtful state of its parentage, many unsatisfactory and inconsistent attempts have been made to reduce it to some analogy with the principles which govern the law of contract, as it prevails in this country between vendor and vendee. It is to be observed, however, that

the right of stoppage *in transitu* is not peculiar to the law of England. It existed, I believe, in the commercial states of Europe. The cases I have already referred to, show that it was practised in the Italian States. That it existed in Holland was proved in a case tried by Lord *Loughborough*, and mentioned by him in his judgment in the case of *Lickbarrow v. Mason* (1 H. Black. 364). That it is the law of Russia was also proved in the cases of *Inglis v. Usherwood* (1 East, 515), and of *Bohtlingk v. Inglis* (3 East, 381). It appears also, on reference to the *Chapitre de Faillite*, in the Code Napoléon, that the law of France on this subject is in all points similar to our own. It is known that this celebrated Code is chiefly a digest of the law of France as it existed before the Revolution. Indeed the right of stopping *in transitu* had, before the composition or digest of that code, acquired in the French law the name of 'Revendication.' It may, therefore, be presumed to be a part of the law of merchants which prevails generally on the Continent. The proof of which, from time to time, combined with its manifest justice and utility, has at length introduced it into the common law of England, of which the law merchant properly understood has always been reckoned to form a part."

Lord *Abinger* is no doubt right in the conclusion at which he arrives, that the right of stoppage *in transitu* was introduced into England as part of the law mer-

chant. The assertion however that the right of stoppage *in transitu* as understood in England, existed in those continental countries where the laws are founded upon the Roman law, is doubtful, and it seems to have been introduced into France by the Code de Commerce. Previous to that time, in France, and in other countries where the principles of the Roman law were adopted, the remedy of the vendor was more extensive than in England, inasmuch as he might when unpaid reclaim the goods even after they had reached the hands of the purchaser. "In this respect," says Lord *Tenterden*, "the law of England is more favourable to the transfer of property, the great subject of commerce, and less attentive to the interest of the seller of goods than the ancient civil law or the modern law of many European nations, which is chiefly founded on the civil law; for the civil law did not in general consider the transfer of property to be complete by sale and delivery alone, without payment or security for the price, unless the seller agreed to give a general credit to the buyer for it; but allowed the seller to reclaim the goods out of the possession of the buyer, as being still the seller's own property. And by the general law of France (since altered by Code de Commerce) in the case of insolvency, 'The seller who has sold a thing, and still lies out of the money which he was to have for it, if he finds the thing that he sold in the hands of the buyer, may

seize on it, and he is not obliged to share it with the other creditors of the buyer.' Whereas by the general law of England, when goods have been delivered into the actual or constructive possession of the buyer, they cannot be reclaimed." Abbott on Shipping, 418, 9th edit.

Having made these preliminary remarks, we may, in examining this subject, consider:—1. By whom the right of stoppage *in transitu* may be exercised. 2. When such right arises. 3. During what period it continues. 4. How it may be exercised. 5. The effect of the right of stoppage *in transitu* being exercised. 6. How such right may be defeated.

1. *By whom the Right of Stoppage in transitu may be exercised.*

—The right of stoppage *in transitu* can be exercised only by a vendor, or a person standing in the position of a vendor of goods. *Feise v. Wray*, 3 East, 93; *Siffken v. Wray*, 6 East, 371; *Tucker v. Humphrey*, 4 Bing. 516; *Patten v. Thompson*, 5 Mau. & Selw. 350.

Where a trader in this country gave an order to his correspondent abroad to ship him certain goods, which the latter procured upon his own credit, without naming the trader, and shipped to him at the original price, charging only his commission, it was held by the Court of King's Bench that the correspondent abroad was so far a *vendor* as between him and the trader in this country, that on the bankruptcy of the latter he might

stop the goods *in transitu*. *Feise v. Wray*, 3 East, 93.

And it seems that even where the vendor has not actually any property in goods, but merely an interest in them under a contract for the delivery of them to him, he may nevertheless stop them *in transitu*. See *Jenkyns v. Usborne*, 8 Scott. n.s. 505, 522.

A mere surety however for the price of goods is not entitled to stop *in transitu*. *Siffken v. Wray*, 6 East, 371.

A person also who has a mere lien upon goods, if he has once parted with the possession, cannot retake them. See *Sweet v. Pym*, 1 East, 4. There Pym the defendant, who was a fuller, had a lien for his general balance upon clothes sent to him by Gard to be fulled. Afterwards, in consequence of orders from Gard, Pym shipped the clothes on a vessel to be forwarded to Gard, and sent to him the invoice. No bill of lading was signed by the captain at the time of the shipment; but soon after the vessel sailed, Pym, hearing of Gard's bankruptcy, followed and overtook the captain in his passage, and procured him to sign a bill of lading to Pym or his order, by virtue of which Pym obtained the goods when they arrived at the end of their voyage. The assignees in trover recovered a verdict under the direction of Lord Eldon, he being of opinion that no person having a lien on goods can, if he part with the possession, afterwards stop them *in transitu*, and thereby revive his lien against

the owner. The Queen's Bench took the same view, and Lord *Kenyon*, C.J., said, "The right of lien has never been carried further than while the goods continue in the possession of the party claiming it. Here the goods were shipped by the order and on account of the bankrupt, and he was to pay the expense of the carriage of them; *the custody therefore was changed by the delivery to the captain*. In the case of *Kinloch v. Craig* (3 T. R. 119; Dom. Proc. ib. 786), where I had the misfortune to differ from my brethren, it was strongly insisted that the right of lien extended beyond the time of actual possession, but the contrary was ruled by this Court, and afterwards by the House of Lords, though there the factor had accepted bills on the faith of the consignments, and had paid part of the freight after the goods arrived."

It is clear, as is laid down in the principal case of *Whitehead v. Anderson*, that an agent acting under a sufficient authority from the vendor, can effect a stoppage *in transitu*. See also *Nicholls v. Le Fleuvre*, 2 Bing. N. C. 81.

But the authority must be given before the *transitus* ceases, for where a stoppage is made by a person without any previous authority from the vendor, his subsequent ratification will not make it good, if the ratification takes place after the *transitus* has determined. Thus in *Bird v. Brown*, 4 Exch. 786, the defendants, without any authority from Illins the

consignor, stopped goods consigned to Carne & Telo, to whom the plaintiffs were the assignees, the stoppage was ratified by Illins after the *transitus* was ended; it was held by the Court of Exchequer that the ratification of the stoppage after the conversion by the defendants, had not the effect of altering retrospectively the ownership of the goods, which had already vested in the plaintiffs. "The doctrine," said *Rolfe*, B., "*Omnis ratihabitio retrahitur et mandato equiparatur*, is one intelligible in principle and easy in its application, when applied to cases of contract. If A. B., unauthorized by me, makes a contract on my behalf with J. S., which I afterwards recognize and adopt, there is no difficulty in dealing with it as having been originally made by my authority. J. S. entered into the contract on the understanding that he was dealing with me, and when I afterwards agreed to admit that such was the case, J. S. is precisely in the condition in which he meant to be; or if he did not believe A. B. to be acting for me, his condition is not altered by my adoption of the agency, for he may sue A. B. as principal, at his option, and has the same equities against me, if I sue, which he would have had against A. B.

"In cases of tort there is more difficulty. If A. B., professing to act by my authority, does that which *primâ facie* amounts to a trespass, and I afterwards assent to and adopt his act, there he is treated as having from the begin-

ning acted by my authority, and I become a trespasser, unless I can justify the act, which is to be deemed as having been done by my previous sanction. So far there is no difficulty in applying the doctrine of ratification even in cases of tort. The party ratifying becomes as it were a trespasser by estoppel; he cannot complain that he is deemed to have authorized that which he admits himself to have authorized.

"But the authorities go much further, and show that in some cases where an act which, if unauthorized, would amount to a trespass, has been done in the name and on behalf of another, but without previous authority, the subsequent ratification may enable the party on whose behalf the act was done, to take advantage of it, and to treat it as having been done by his direction. But this doctrine must be taken with the qualification, that *the act of ratification must take place at a time and under circumstances when the ratifying party might himself have lawfully done the act which he ratifies*. Thus in *Lord Audley's case* (Cro. Eliz. 561; Moore, 457; Poph. 176, nom. *Lord Audley's case*), a fine with proclamation was levied of certain land, and a stranger within five years afterwards, in the name of him who had right, entered to avoid the fine. After the five years, and not before, the party who had the right to the land ratified and confirmed the act of the stranger. This was held to be inoperative, though such

ratification within the five years would probably have been good. Now the principle of this case, which is reported in many books, and is cited with approbation by Lord Coke in *Margaret Podger's case* (9 Co. 104 a), appears to us to govern the present. There the entry, to be good, must have been made within the five years; it was made within that time, but till ratified it was merely the act of a stranger, and so had no operation against the fine. By the ratification, it became the act of the party in whose name it was made; but that was not till after the five years. He could not be deemed to have made an entry till he ratified the previous entry, and *he did not ratify until it was too late to do so*. In the present case, the stoppage could only be made during the *transitus*. During that period the defendants, without authority from Illins, made the stoppage. After the *transitus* was ended, but not before, Illins ratified what the defendants had done. From that time the stoppage was the act of Illins, but it was then too late for him to stop; the goods had already become the property of the plaintiffs, free from all right of stoppage."

Even the actual possession of goods by the vendor's agent will not amount to a stoppage *in transitu*, unless it were taken with that intent (*Siffken v. Wray*, 6 East, 371); but where a person takes possession of goods with the intent of effecting a stoppage *in transitu*, it will not be rendered

invalid in consequence of its having been suggested by the purchaser. *Mills v. Ball*, 2 B. & P. 457.

2. *When the Right of Stoppage in transitu arises.*—The right to stop goods *in transitu* is limited to cases where the *bankruptcy* or *insolvency* of the vendee has taken place. *Wilmshurst v. Bowker*, 2 Man. & Gr. 792. By insolvency is meant a general inability to pay debts, of which the failure to pay one just and admitted debt would probably be sufficient evidence. See *Biddlecombe v. Bond*, 4 Ad. & Ell. 332; *Newsom v. Thornton*, 6 East, 17; *Vertue v. Jewell*, 4 Campb. 31; *Dixon v. Yates*, 5 B. & Ad. 313; *Bird v. Brown*, 4 Exch. Rep. 786.

But the vendor should be cautious not to assume the right to stop *in transitu* unless he have good ground for believing the vendee to be insolvent. For "if," as observed by Lord *Stowell*, "the person to whom goods are consigned is *not* insolvent; if from misinformation, or from excess of caution, the vendor has exercised this privilege prematurely, he has assumed a right that did not belong to him, and the consignee will be entitled to the delivery of the goods, with an indemnification for the expenses that may have been incurred. In the law of England, as far as I can collect it, and in all books into which I have looked, it is not an unlimited power that is vested in the consignor, to vary the consignment at his pleasure in all cases whatever.

It is a privilege allowed to the seller, for the particular purpose of protecting him against the insolvency of the consignee. Certainly it is not necessary that the person should be actually insolvent at the time. If the insolvency happens before the arrival, it would be sufficient, I conceive, to justify what has been done, and to entitle the shipper to the benefit of his own provisional caution. But if the person is not insolvent, the ground is not laid on which alone such a privilege is founded." '*The Constantia*,' 6 Rob. Ad. Rep. 321, 326; and see *Wilmshurst v. Bowker*, 2 Man. & Gr. 792.

The vendor cannot exercise the right to stop *in transitu* unless the whole or part of the purchase-money is unpaid. It has never been doubted but that he might do so if the purchase money was wholly unpaid. A question however was raised, whether he could do so when he had received a part payment thereof. It was however ultimately determined that the circumstance of a vendee having partially paid for goods, does not defeat the vendor's right to stop them *in transitu*. *Hodgson v. Loy*, 7 T. R. 440.

A purchaser may even, on the bankruptcy or insolvency of the vendee, stop goods *in transitu*, although they may have been sold on credit, so that the price was not actually due at the time of the stoppage. *Inglis v. Usherwood*, 1 East, 515; *Bohtlingk v. Inglis*, 3 East, 381.

Where the vendor has only re-

ceived securities for the purchase-money, such as bills of exchange accepted by the purchaser, he may stop the goods upon the purchaser becoming bankrupt or insolvent, even although he may have negotiated the bills, and they are still outstanding and not yet at maturity. (See *Feise v. Wray*, 3 East, 93; *Patten v. Thompson*, 5 Mau. & Selw. 350; *Edwards v. Brewer*, 2 Mees. & W. 375; sed vide *Davis v. Reynolds*, 4 Campb. 267.) *A fortiori* if the bills on arriving at maturity have been dishonoured. *Dixon v. Yates*, 5 B. & Ad. 345.

It seems however that "although the vendee may have become insolvent, still if the state of his accounts with the vendor be such that the vendor is, on account of the balance upon the whole, indebted to the vendee, he cannot stop *in transitu* goods of less value consigned to the vendee, on account of the balance; for the delivery of them to the vendee's representatives can, in that case, be productive of no injustice; and if the balance against him be occasioned by the vendee's being under acceptances for his accommodation, he cannot stop *in transitu* until the bills are paid." Smith's Mercantile Law, 557, 6th edit.; see also *Vertus v. Jewell*, 4 Campb. 31.

3. *During what period the Right of Stoppage in transitu continues.*—The right of the vendor to stop goods consigned to the vendee continues during the period of their transit from the former to the latter; while they are in the

possession of the vendor he has a lien upon them. The question therefore which generally arises in these cases is, whether the transit was or was not at an end before the stoppage of the goods by the vendor or his agents.

As a general rule, the *transitus* is not at an end until the goods arrive at the actual or constructive possession of the consignee. Per *Tindal, C.J.*, in *Jackson v. Nichol*, 5 Bingh. N. C. 516.

Before however considering when the *transitus* begins and when it ends, we may perhaps first more conveniently notice those cases where there is in reality no *transitus*, though they are often spoken of as cases of stoppage *in transitu*, but which in reality decide when the vendor's possession ends, and that of the vendee begins. Thus if after goods are sold, they remain in the warehouse of the vendor, and he receives warehouse rent for them from a sub-vendee, after the time when according to the terms of the original sale they ought to have been taken away, this will amount to a delivery of the goods to the sub-vendee, so as to put an end to the vendor's right of stoppage *in transitu*. See *Hurry v. Mangles*, 1 Campb. 452. "The acceptance of warehouse rent," said Lord *Ellenborough*, in that case, "is a complete transfer of the goods to the purchaser. If I pay for a part of a warehouse, so much of it is mine. It is an executed delivery by the seller to the buyer. . . . It would be over-

turning all principles to allow a man to say, after accepting warehouse rent, 'The goods are still in my possession, and I will detain them till I am paid.' The *transitus* is at an end. The goods are transferred to the person who paid the rent, as much as if they had been removed to his own warehouse, and there deposited under lock and key." See also *Stoveld v. Hughes*, 14 East, 308; *Anderson v. Scott*, 1 Campb. 285, n.; *Hodgson v. Le Bret*, 1 Campb. 233; sed vide *Elmore v. Stone*, 1 Taunt. 458; *Carter v. Tbussaint*, 5 B. & Ald. 855.

It seems, however, that even where goods are sold under an invoice which expresses that they remain at a rent in the warehouse of the vendor, the *transitus* will not be at an end as between the original vendor and purchaser, and the goods being in the possession of the vendor, he may retain them until the price and the rent be paid. *Miles v. Gorton*, 2 C. & M. 504. In *Townley v. Crump*, 4 Ad. & Ell. 58, Crump, who was a warehouseman, sold wine to Wright and gave him a note in these terms: "Mr. B. Wright. We hold to your order 39 pipes and 1 hhd. red wine, marked J. C., J. M., No. 41. a, 67—69 a., 80—pipes, No. 105 hhd., rent free to 29th November next. J. Crump & Co." The wine remained in Crump's warehouse. Wright accepted a bill for the price and then became bankrupt. It was held by the Court of Queen's Bench that the right of lien was not divested by giving such delivery or-

der. "There was a total failure of proof," said Lord Denman, C. J., "that, where a vendor who is himself the warehouseman, sells to a party who becomes bankrupt before the goods are removed from the warehouse, the delivery order operates, by reason of this custom, to prevent a lien from attaching; and I think it is not contended that there is any general usage which could divest this right in such a case, upon the insolvency of the vendee. Cases have been cited, but none where the question arose between the original vendor and vendee."

Sometimes goods sold when they are not in the actual possession of the vendor, but of a third party, as a warehouseman, or wharfinger, and the question often arises, when can an unpaid vendor intercept the goods, or countermand their delivery to the vendee? In the first place this proposition seems to be clear that, when the goods sold are in the hands of a third party, and when everything is done which ought to be done to render the contract complete, the right of stoppage *in transitu* is gone, if the possession has been changed. Per Pigot, C. B., in *Orr v. Murdock*, 2 Ir. Com. Law Rep. n.s. 16. Thus, if the warehouseman gives actual possession of the goods to the purchaser, the right of stoppage *in transitu* will be gone; but mere equivocal acts, such as marking, taking samples, or cooping, without any removal of the goods, from the possession of the warehouseman, will not, it seems, have

that effect, unless accompanied by such circumstances as to denote that the warehouseman was intended to keep, and assented to keep the goods in the nature of an agent of custody for the purchaser. *Dixon v. Yates*, 5 B. & Ad. 813. See *Whitehead v. Anderson*, ante, p. 547.

But where the vendor gives an absolute authority to the vendee to take possession of goods in the hands of a third party, as for instance a wharfinger or warehouseman, if such third party consents to hold the goods for the vendee, then it is clear the vendor's right of stoppage *in transitu* is put an end to. The consent of the third party to hold goods for the vendee may be shown in various ways,—by transferring the goods on receiving the delivery order into the name of the purchaser (*Harman v. Anderson*, 2 Camb. 242), and indeed his mere assent verbally or by acquiescence, on receipt of the delivery order, will have the same effect (*Ib. Lucas v. Dorrien*, 7 Taunt. 279). In the case of *Harman v. Anderson*, 2 Campb. 242, Dudley bought 600 casks of butter then lying in the defendants' warehouses. The vendors gave him a delivery order, which he immediately lodged with the defendants, who thereupon transferred the goods in their books into his name, and actually debited him with the warehouse rent. Immediately after the goods had been transferred, Dudley became insolvent, and the vendors gave the defendants notice to hold the goods on their account. The defendants

in consequence of this delivered the goods back to the vendors. Dudley's assignees brought trover against the warehousemen and obtained a verdict. "The goods," said Lord *Ellenborough*, C. J., "having been transferred into the name of the purchaser, it would shake the best established principles, still to allow a stoppage *in transitu*. From that moment the defendants became trustees for the purchaser, and there was an executed delivery as much as if the goods had been delivered into his own hands. The payment of the rent in these cases is a circumstance to show on whose account the goods are held, but it is immaterial here, the transfer in the books being of itself decisive. I am clearly of opinion that the assignees are entitled to recover." Afterwards a motion was made to reduce the damages, inasmuch as it was proved by affidavits that, as to one parcel of butter, Dudley having received the delivery note from the vendor, sent it to the defendants, and that they neither made any transfer in their books to his name, nor did anything to testify that they accepted the delivery note, or held these goods on his account. The Court of Queen's Bench however held that this was immaterial. "After the note was delivered to the wharfingers," said Lord *Ellenborough*, C. J., "they were bound to hold the goods on account of the purchaser. The delivery note was sufficient, without any actual transfer being made in their books. From thenceforth they became the agents of Dudley

the bankrupt. They themselves might have a lien on the goods, and be justified in detaining them till that was satisfied; but as between vendor and vendee, the delivery was complete, and the right to stop *in transitu* was gone." See also *Cooke v. Lawder*, 9 Ir. Law Rec. 21; *Keyser v. Suse*, Gow, 58; *Barton v. Boddington*, 1 C. & P. 207; *Tucker v. Ruston*, 2 C. & P. 86.

A question may arise how far, when a warehouseman or wharfinger absolutely refuses, on the receipt of a delivery order, to hold the goods at the disposal of the vendee, the vendor's right of stoppage *in transitu* will remain. It has been decided however where the goods are not in the name of the vendor, when the vendee hands the delivery order to the warehouseman, that on his declining to act upon it, the vendor, if unpaid, may still stop the goods, inasmuch as there was no actual or constructive delivery of them to the vendee. *Lackington v. Atherton*, 8 Scott, n.s. 88. The result however would probably have been different if the goods had been in the name of the vendor, for then the warehouseman would, in the words of Lord *Ellenborough*, C. J., in *Harman v. Anderson* (*ante*, p. 557), have "been bound to hold the goods for the purchaser."

Where the authority in a delivery order to give possession is conditional upon some act being done, as for instance that of weighing, as was the case in *Hanson v. Meyer* (*ante*, p. 513), the right of the vendor to stop *in transitu*, if that act be

not done, will not be put an end to on the receipt of the delivery order by the warehouseman, or even by a symbolical delivery by transfer in the books of the warehouseman. See also *Wallace v. Breeds*, 13 East, 522; *Busk v. Davis*, 2 M. & Selw. 397; *Shepley v. Davis*, 5 Taunt. 617. But where the identity of the goods and the quantity are known, and the weighing can only be had for the satisfaction of the buyer, in such case the transfer of the goods in the books of the warehouseman to the name of the purchaser will defeat the vendor's right of stoppage *in transitu*. *Hammond v. Anderson*, 1 Bos. & P. N. R. 69; *Swanwick v. Sothorn*, 9 Ad. & Ell. 895.

The mere fact that in a delivery order, directed to the excise with whom goods are warehoused, requests them to receive the duty, will not be considered to render the payment of the duty a condition precedent, so that on presentation of the delivery order by the vendee the goods will be considered as having been delivered to the vendee. See *Haig v. Wallace* (2 Ir. Law Rep. n. s. 11, cited), where there had been an actual transfer in the books of the excise to the name of the vendees. The result is the same when there has been no such transfer. Thus in *Orr v. Murdock* (2 Ir. Com. Law Rep. n. s. 9), Graham and Co., Scotch distillers, consigned ten puncheons of whisky to Purdy, an Irish spirit dealer residing in Newry. With the consignment Graham and Co. sent to Purdy an invoice of the

whisky, and a *delivery order* directed to the collector of excise at Newry, as follows:—"Sir,—Receive the duty and deliver to the order of Mr. Purdy the under-noted ten casks of British plain spirits, warehoused at Newry on the 20th of April, 1850, by Graham and Co. (Signed) Graham and Co." Purdy lodged the delivery order with the storekeeper of the excise, and removed six of the ten casks, having paid the duty on them, but no transfer of the whisky was made to the name of Purdy in the excise books. Purdy afterwards became bankrupt, and Graham and Co. transferred the four puncheons which remained in the excise stores to Cattarack, who paid the duty and removed them. It was held by the Court of Exchequer in Ireland, that the possession was transferred from the vendor to the vendee by the lodgment of the delivery order, without any transfer in the books of the excise, and that the right of stoppage *in transitu* by the unpaid vendors was therefore gone. "It has been argued," said *Pigot*, C.B., "that by the delivery order the condition that the purchaser should pay the duty was annexed, and therefore that the sale was not absolute until that was done, as the vendor remained liable for it to the Crown. But the property was altered by the sale and passed to the vendee, subject to the Crown's right to duty; bills were given for the price exclusive of duty, for which the possession of the

whisky was a sufficient security to the Crown. The words of the order do not make a condition precedent. Such language if addressed to an agent of the vendor would have that effect, but not to a servant of the Crown. It amounts merely to an intimation from the vendor apprising the officer that he has put the vendee into his own place, and that the goods are transferred to him, with their liability to the Crown. In *Haig v. Wallace*, the officer acted on the delivery order by transferring the goods in the books of the excise to the name of the vendee; but that act of the officer could not alter the effect of the acts of the parties."

An agreement however to pay the duty may be made conditional. See *Winks v. Hassall*, 9 B. & C. 372.

To return now to the consideration of the right of stoppage *in transitu*, rightly so called; it may be laid down as a general rule that the *transitus* continues whilst the goods, having left the possession of the vendor, are in the hands of an agent to *forward* them, who neither has possession as bailee for the vendor, nor as agent to hold them under the orders of the purchaser.

While goods are in the hands of a *public* carrier, either by land or by water, and the journey is incomplete, they will be *in transitu*, inasmuch as the carrier clearly holds them only in the capacity of an agent to forward. *Black. Cont. of Sale*, 241.

If however goods are put in the

purchaser's own cart or vessel, the *transitus* is immediately at an end, inasmuch as the carter or master is not a mere agent to forward to the purchaser, but is his servant, and holds the goods to his order. *Id.* 242.

The question then which often arises is, whether the person who holds the goods holds them as a mere carrier, or as servant of the purchaser.

Thus, where goods are put on board a vessel chartered by the purchaser, the question whether a delivery on board puts an end to the *transitus* turns upon the fact whether the master is to be considered as the servant of the charterer or the shipowner, and this depends upon the construction of the charter-party. In general the master is merely the servant of the shipowner, and in that case he is a mere agent to forward, so that a delivery of the goods on board the ship will not put an end to the *transitus*. See *Inglis v. Usherwood*, 1 East, 515; *Bohtlingk v. Inglis*, 3 East, 381; *Gurney v. Behrend*, 3 Ell. & Bl. 622, 633.

It was held however in the case of *Fowler v. Kymer* (cited 1 East, 522, 3 East, 396) that where a vessel had been chartered for a term of years, during which period the charterer was to have the entire disposition and control of her, that the vessel was the charterer's own, and that the delivery of goods to his order on board was the same thing as delivery into his warehouse. *Abbott on Shipping*, 240, 9th edit.; see also *Cowasjee*

v. Thompson, 5 Moo. P. C. C. 165; *Jones v. Jones*, 8 M. & W. 481; *Van Casteel v. Booker*, 2 Exch. 691; see also *Turner v. Trustees of the Liverpool Docks*, 6 Exch. 566; *Key v. Cotesworth*, 7 Exch. 595.

As to the construction of charter-parties on this point, see *post*.

Although a delivery of goods on board the purchaser's own ship is a delivery to him, nevertheless the vendor may protect himself by special terms restraining the effect of such delivery. If for instance the bill of lading makes the goods deliverable to the order of the consignor or his assigns, this will be decisive to show that no property passed to the consignee, it being clearly the intention of the consignor to preserve his title to the goods until he did a further act. See *Wait v. Baker*, 2 Exch. 1; *Van Casteel v. Booker*, 2 Exch. 691; *Ellershaw v. Magniac*, 6 Exch. 570 n. And the want of authority of the master to accept the goods on such terms is immaterial. *Turner v. Trustees of the Liverpool Docks*, 6 Exch. 543, 568.

It is immaterial that the goods after having been sent from the vendor, are not actually on their journey when he attempts to stop them, as his right to do so will depend upon the fact whether they have reached the hands of a person who has custody of them as an agent to forward, or as an agent to hold subject to the orders of the buyer. This is well illustrated in the case of *Dixon v. Baldwin*, 5 East, 175 (the mar-

ginal note of which is not quite accurate). There persons, who afterwards became insolvent, ordered goods from the defendants "to be forwarded to Metcalfe and Co. at Hull, to be shipped for Hamburg as usual." It was proved that the "goods were to remain at the Metcalfes' warehouse for the orders of the insolvents, and that the Metcalfes had no other authority to forward them, and that at the time the goods were stopped they were waiting for their orders. It was held by the Court of King's Bench that the goods in the hands of the Metcalfes were not *in transitu*. "If the transit," said Lord *Ellenborough*, C.J., "be once at an end, the delivery is complete, and the *transitus* for this purpose cannot commence *de novo* merely because the goods are again sent upon their travels towards a new and *ulterior destination*. . . . The late cases of *Leeds v. Wright* (3 Bos. & P. 320) and *Scott v. Pettit* (ib. 469) are authorities to the same effect. In the former the *transitus* was holden to be at an end when the goods had reached the defendant, who was the packer of one Morsseron, a general agent of Le Grand and Co. at Paris, and who had a general power of disposal in respect to them, and might have sent the goods either to his principals at Paris, or to Holland, Germany, or such other market as he should think best. And the latter case, similar in many circumstances to the former, was decided on the same ground, viz. that the *transitus* of goods is only

not at end upon their reaching the packer, where they remain with him for the purpose of being forwarded to some ulterior appointed place of destination. But here, as in those cases, the goods had so far gotten to the end of their journey, that they waited for new orders from the purchaser to put them again in motion, to communicate to them another substantive destination, and that without such orders they would continue stationary." See also *Wentworth v. Outhwaite*, 10 M. & W. 436; *Dodson v. Wentworth*, 5 Scott, N. R. 821; 4 Man. & Gr. 1080.

Where a person receives the goods from the vendor, as a mere middleman or agent to forward them to their destination, the *transitus* will not be determined on their coming into his possession. See *Jackson v. Nichol*, 5 Bing. N. C. 508. There *Crawhall*, an agent of the insolvents, purchased lead from the plaintiff at Newcastle, without specifying any place of delivery. *Crawhall* for some years previous to the purchase had been in the habit of purchasing lead for the insolvents, and his general course was to hold it in his possession until he received directions from them. In this instance, however, the insolvents previous to the vendor parting with the lead by letter had ordered it to be forwarded to London; the vendor thereupon gave a delivery order to *Crawhall* (who indorsed it to a wharfinger), as follows, "Deliver the above to the bearer to go on board the *Esk*." The wharfinger handed

the order to a keelman, who got the goods and put them on board the 'Esk.' The 'Esk' sailed for London, and moored in the Thames. The defendants, who were wharfingers, by the orders of the insolvents received the goods on board a lighter, and then they were stopped by the plaintiff, as being an unpaid vendor. It was held by the Court of Common Pleas that the lead was still *in transitu*. "If," said *Tindal*, C. J., "the lead had been delivered into the possession of Crawhall as the agent of the buyers, there to remain until Crawhall received orders for their ulterior destination, such possession of Crawhall would have been the constructive possession of the buyers themselves, and the right to stop *in transitu* would have been at an end. The case would then have fallen within the principle laid down in *Dixon v. Baldwin*. But upon the facts stated in this special case, the lead in question never came into the actual possession of Crawhall the agent; for it was delivered from the premises of the plaintiff, the seller, to a keelman in the employ of the defendants, for the purpose of being put on board the defendants' vessel, the 'Esk,' a general trader between Newcastle and London, and by him was so taken and put on board accordingly. Neither again does Crawhall appear to have been an agent of the buyer for the purpose of receiving the lead into his possession, either as a place of deposit, until he received directions from the buyer for its ulterior destina-

tion, or for sending it on to the buyer under general directions for that purpose; for whatever may have been his course of dealing on former occasions, in this particular transaction he acted on and was clothed with no other authority than that which he derived from the letter of the buyer, that is, merely upon a desire expressed in that letter that the lead should be forwarded without delay. And we think the order given by the plaintiff to deliver the lead to the order of Crawhall, and the subsequent order by Crawhall 'to deliver it to the bearer' (who was the keelman) to go on board the 'Esk,' did not amount to any taking possession by Crawhall, but merely formed a link in the chain of the machinery by which the lead was put in motion, and in a course of transmission from the seller's premises in Newcastle to the buyer's in London; the legal consequences being precisely the same as if the order to forward the lead had come direct from the buyer to the seller, instead of circuitously through Crawhall's hands; and further, that the putting the lead on board the 'Esk' was only a continuance of such *transitus*." See also *Smith v. Goss*, 1 Campb. 282; *Coates v. Railton*, 6 B. & C. 422; *Mills v. Ball*, 2 Bos. & P. 457.

In some cases the question is somewhat more complicated when the carrier acts also in another capacity, for instance as warehouseman or wharfinger; it will however be seen on an examination of the authorities that they all

depend upon the same principle, viz. that as the possession of the goods is ambiguous, the intention of the parties as to whether the possessor is to hold them merely as an agent to forward, or as an agent to hold them at the order of the purchaser, must be gathered from the acts of the parties. See *James v. Griffin*, 2 M. & W. 623; *Jackson v. Nichol*, 5 Bing. N. C. 508; *Lackington v. Atherton*, 8 Scott, N. S. 38.

The carrier may, as is laid down in the principal case of *Whitehead v. Anderson* (*ante*, p. 547), enter expressly or by implication into a new agreement, distinct from the original contract for carriage, to hold the goods for the consignee as his agent, not for the purpose of expediting them to the place of original destination pursuant to that contract, but in a new character, for the purpose of custody on his account, and subject to some new or further order to be given to him; and in such a case the *transitus* will be at an end; but if the carrier refuse to hold the goods as agent for the purchaser, it will continue, unless, as we shall hereafter see, the purchaser himself does some acts whereby he takes possession of the goods.

The purchaser may himself anticipate the natural termination of the *transitus*, and take them into his own possession, and by that means put an end to the vendor's right of stoppage *in transitu* (*Mills v. Ball*, 2 Bos. & P. 457; *Wright v. Lawes*, 4 Esp. 82; *Oppenheim v. Russell*, 3 Bos. & P. 42; *Jackson*

v. Nichol, 5 Bing. N. C. 508; see *vide Holst v. Pownall*, 1 Esp. 242); and the result will be the same even where the purchaser takes possession of the goods without the consent of the carrier, "though," it is observed in *Whitehead v. Anderson*, "in the absence of the carrier's consent, it may be a wrong to him, for which he would have a right of action." *Ante*, p. 547.

The question may next arise what is sufficient to amount to a taking of possession by the purchaser. As is laid down in the principal case of *Whitehead v. Anderson*, "it appears to be very doubtful whether an act of marking or taking samples, or the like, without any removal from the possession of the carrier, so as though done with the intention to take possession, would amount to a constructive possession, unless accompanied with such circumstances as to denote that the carrier was *intended to keep, and assented to keep* the goods in the nature of an agent for custody." *Ante*, p. 547. In the case of *Foster v. Frampton*, 6 B. & C. 107, it is clear that there were such circumstances. There the defendants, wholesale grocers in London, had by order of the bankrupt, who carried on business as a grocer at Birmingham, sent to him a quantity of lump sugar and three hogsheads of raw sugar by a carrier, who on his reaching Birmingham gave notice of their arrival. The bankrupt thereupon removed the lump sugar to his premises, and took samples from the three hogsheads

of raw sugar, but desired that they might remain in the carrier's warehouse until he received further directions. It was held that the *transitus* was at an end, and that the vendor was not entitled to stop them. "Where," said *Bayley, J.*, "a man orders goods to be delivered at a particular place, the *transitus* continues until they are delivered to the consignee at that place; but that must be understood of a delivery in the ordinary course of business, for if the consignee, before the goods reach their ultimate destination, postpones the delivery, or does any act which is equivalent to taking actual possession of them, the *transitus* is at an end. Now here the bankrupt has done such an act, for he not only postponed the delivery which would have taken place in the ordinary course of business, but he took samples, and directed the carrier to keep the goods in his warehouse until he received further directions. From that time the carrier became the warehouseman of the bankrupt, and the goods were as much in the possession of the latter as if he had taken them into his own warehouse." See also *Richardson v. Goss*, 8 Bos. & P. 119; *Scott v. Pettit*, ib. 469.

In the principal case of *Whitehead v. Anderson*, it was held that the mere touching of the timber by the agent of the assignees of the purchaser did not amount to an act of ownership on his part, and as there was no contract either express or implied on the part of

the captain to alter the relation in which he stood before, as a mere instrument of conveyance to an appointed destination, into an agent of the consignee for a new purpose, there was no constructive possession on the part of the vendee, so as to put an end to the *transitus*. See also *Ellis v. Hunt*, 3 T. R. 464.

Another question sometimes arises, viz. how far a delivery of part of goods sold, either by the vendor himself or his agent as a warehouseman or carrier, will amount to a delivery of the whole, so as to prevent in the first case his retaining, in the second case his stopping *in transitu* the remaining goods until the purchase-money be paid. It seems now to be settled that the result depends upon the intention with which the vendee took possession. If the vendee takes possession of part of the goods, *not meaning thereby to take possession of the whole, but to separate that part*, and to take possession of that part only, it puts an end to the *transitus* only with respect to that part, and no more; and the right of lien or the right of stoppage *in transitu* on the remainder still continue. *Tanner v. Scovell*, 14 M. & W. 28; *Jones v. Jones*, 8 M. & W. 431; *Wentworth v. Outhwaite*, 10 M. & W. 451; *Bunney v. Poyntz*, 4 B. & Ad. 570.

If however the vendee takes possession of a part of the goods, in the progress of and with the intention of taking possession of the whole, that will be held to

divest the vendor's right of stopping *in transitu*. *Hammond v. Anderson*, 1 Bos. & P. N. R. 69; and see *Slubey v. Heyward*, 2 H. Black. 504; *Hanson v. Meyer*, 6 East, 614; and *ante*, p. 501.

With regard to the actual possession, it is clear upon the authorities that if a man orders goods to be delivered at a particular place, the *transitus* will be at an end when they are delivered to the consignee (*Foster v. Frampton*, 6 B. & C. 107), or in case of his bankruptcy to his assignees (*Bird v. Brown*, 4 Exch. 786) at that place. See also *Heinekey v. Earle*, 8 Ell. & Bl. 410.

A mere delivery however at the place of destination is not necessarily a termination of the transit; the transit remains until the goods have come into the possession of the consignee; and although they are landed at the place to which they are destined, unless the consignee has taken possession of them, they are still in transit, and the consignor on the insolvency of the consignee may still exercise his right to stop them *in transitu*. Per Lord Campbell, C. J., in *Heinekey v. Earle*, 8 Ell. & Bl. 423. See also *James v. Griffin*, 2 M. & W. 623; *Crawshay v. Eades*, 1 B. & C. 181.

But where the goods arrive at their place of destination, if the purchaser or those standing in his place as his assignees demand the goods and tender the amount due for freight, the carriers are bound to deliver them up, and cannot by their wrongful detainer of them

and delivery of them over to other parties, prolong the *transitus*, and so extend the period during which the stoppage may be made. *Bird v. Brown*, 4 Exch. 786, 797.

The right to stop *in transitu* when the goods have once come into the possession of the purchaser will not be revived by their being re-delivered by the purchaser to the vendor for a special purpose, as, for instance, in order that they may be repacked. *Valpy v. Gibson*, 4 C. B. 837.

4. *How the Right of Stoppage in transitu may be exercised.*—Although at one time it was thought that in order to stop goods *in transitu*, it was necessary that there should be an *actual* possession of them obtained by the vendor or his agent before they came to the hands of the vendee, it is now clearly settled that notice on the part of the unpaid vendor, that is to say, either by himself or his agent, to the carrier to stop the goods *in transitu*, is sufficient to attach the vendor's lien upon them for the unpaid purchase-money, and the carrier becomes liable for the consequences of his delivering them after such notice, either to the purchaser or his assignees, against whom the purchaser may also bring trover for them. See *Litt v. Cowley*, 7 Taunt. 169, there it appeared that the plaintiffs pursuant to an order had on the 9th December delivered the goods to Pickfords, carriers at Manchester, to be brought by a canal to London, addressed to Neale and War-

ner. Afterwards seeing cause to stop them *in transitu*, they gave notice to the Pickfords, the carriers in the country at the place whence the boats started, to deliver the goods not to Neale and Warner, but to an agent of the plaintiff's own; and the Pickfords in the country wrote to Pickfords in London according to the notice they had received from the plaintiffs; the Pickfords in London however, in consequence of a mistake of a clerk, delivered them on 23rd December to Neale and Warner, and debited them with the freight. They unpacked them and sold a part. On the 19th January following a commission of bankrupt issued against Neale and Warner, and the defendants, who were their assignees and had taken possession of the goods, refused, on demand made on 3rd February, to restore them to the plaintiffs. It was held by the Court of Common Pleas that the vendor might maintain trover for the goods. "It was formerly held," said *Gibbs*, C. J., "that the only way of stoppage *in transitu* was by actual corporal touch of the goods. It has since been held, that after notice to a carrier not to deliver, he is liable for the goods in trover against himself, if he does deliver them. It is clear, therefore, that after this notice, Pickfords delivering them to Neale and Warner are liable in trover for the goods, and I thought it monstrous to say that their delivery of them by mistake, under such a liability, would confirm the property in the bankrupt. The

law of stoppage *in transitu* says that the property which was before in the bankrupts may be re-vested in the seller by notice to the carrier. The plaintiffs give that notice to the carrier, and thereby re-vest the property. Before such notice to the carrier to stop the goods, the purchaser may bring trover for them; after such notice, the seller may bring trover. A vendor could not maintain trover against a carrier, unless he could re-vest the property in himself; and if he can re-vest it, then the subsequent delivery by mistake will not perfect the sale." See also *Hunter v. Beale*, cited 3 T. R. 466; *Stokes v. La Rivière*, cited 3 East, 397; *Mills v. Ball*, 2 B. & P. 457; *Bohtlingk v. Inglis*, 3 East, 381.

"To make," as is laid down in *Whitehead v. Anderson*, "a notice effective as a stoppage *in transitu*, it must be given to the person who has the immediate custody of the goods; or if given to the principal, whose servant has the custody, it must be given, as it was in the case of *Litt v. Cowley* (7 Taunt. 169), at such a time and under such circumstances, that the principal by the exercise of reasonable diligence may communicate it to his servant in time to prevent the delivery to the consignee; and to hold that a notice to a principal at a distance is sufficient to re-vest the property in the unpaid vendor, and render the principal liable in trover for a subsequent delivery by his servants to the vendee, when it was impossible, from the distance and want

of means of communication, to prevent that delivery, would be the height of injustice." Per Parke, B., *ante*, p. 547.

5. *The Effect of the Exercise of the Right of Stoppage in transitu.*—It is a question not yet decided whether the effect of stoppage *in transitu* is to rescind the contract, or merely to replace the vendor in the same position as if *he had not parted with the possession*, by giving him a lien for the price unpaid. The latter seems to be the prevalent opinion. Thus in *Hodgson v. Loy*, 7 T. R. 445, where it was held that part payment of the price did not take the case out of the ordinary rule as to stoppage *in transitu*. Lord Kenyon, C. J., said "that the right of the vendor to stop goods *in transitu* in case of the insolvency of the vendee was a kind of *equitable lien* adopted by the law for the purposes of substantial justice, and that it did not proceed, as the plaintiff's counsel supposed, on the ground of rescinding the contract." See also *Clay v. Harrison*, 10 B. & C. 99; *Stephens v. Wilkinson*, 2 B. & Ad. 323; *Wentworth v. Outhwaite*, 10 M. & W. 452; *sed vide Jenkyns v. Usborne*, 8 Scott, N. R. 522. Moreover the acceptance of bills for the *whole* price by the vendee becoming bankrupt, being upon proof under the bankruptcy only equivalent to a part payment, will not conclude the right to stop *in transitu*, as "it only diminishes the vendor's lien *pro tanto* on the goods detained." *Feise v. Wray*, 3 East, 93; see

also *Nichols v. Hart*, 5 C. & P. 179.

Upon this principle, "the buyer, or those who stand in his place, may still obtain the right of possession if they will pay or tender the price, or they may still act upon their right of property if anything unwarrantable is done to that right. If, for instance, the original vendor sell when he ought not, they may bring a special action against him for the injury they sustain by such wrongful sale, and recover damages to the extent of that injury; but they can maintain no action in which right of property and right of possession are both requisite, unless they have both those rights." Per Bayley, J., in *Bloxam v. Sanders*, 4 B. & C. 949; see also *Edwards v. Brewer*, 2 M. & W. 375; *Van Casteel v. Booker*, 2 Exch. 702.

The carrier in whose possession the goods are stopped *in transitu* has only a lien upon them for the sum due for carriage, and upon tender made of that sum the person sending the goods has a right to resume them, and the carrier cannot claim to retain them on account of any *general* balance between him and the consignee. *Oppenheim v. Russell*, 3 Bos. & P. 42; and see *Butler v. Woolcott*, 2 Bos. & P. N. R. 64; *Morley v. Hay*, 3 Man. & Ry. 396.

Upon the same principle it has been decided that the right of a vendor to stop *in transitu* cannot be defeated by process of attachment out of the Lord Mayor's Court, issuing against the consignee, in-

asmuch as the attaching creditor has no greater right in the goods than the vendee. See *Smith v. Goss*, 1 Campb. 282, where Lord *Ellenborough*, C.J., observed: "The vendor's power of intercepting the goods was the elder and preferable lien, and not superseded by the attachment, any more than it would have been by the general right of a common carrier to retain all his customers' goods for his general balance, which had been decided against the carrier."

Assuming the contract of sale not to be rescinded by a stoppage *in transitu*, it would follow that the goods when stopped would remain at the risk of the vendee.

If the stoppage *in transitu* be *wrongful*, it clearly will not effect a rescission of the contract or affect the vendor's right of suing for the price of the goods. *In re Hum-berston*, 1 De Gex, 262; *Gillard v. Brittan*, 8 M. & W. 575.

6. *How the Right of Stoppage in transitu may be defeated.*—If a vendee sell goods to a third party *before* they have been delivered to him, the subvendee will take them subject to the right of stoppage *in transitu* for the purchase-money, as he cannot in general stand in a better situation than his vendor. *Dixon v. Yates*, 5 B. & Ad. 313, 339; *Small v. Moates*, 9 Bing. 574; *Jenkyns v. Osborne*, 8 Scott, N. R. 505; 7 Man. & Gr. 678.

Where however the vendee, a shipper, has had a bill of lading from the vendor, if he or his consignee with his authority indorse

it to a subvendee for valuable consideration, *bond fide* and without notice, the right of stoppage *in transitu* will be thereby defeated. The leading case upon this subject is *Lickbarrow v. Mason*, 2 T. R. 63; 1 H. Black. 357; 6 East, 21; 1 Smith's L. C. 595, 4th ed.: *Pennell v. Alexander*, 3 Ell. & Bl. 283; *Gurney v. Behrend*, 3 Ell. & Bl. 622.

But although a bill of lading may have been indorsed to a *bond fide* purchaser, it is essential in order to defeat the right to stop *in transitu*, that the bill of lading should have come into his possession with the authority of the original vendor. *Prima facie*, indeed, unpaid vendors have a right to stop the goods sold while they are *in transitu*; but the onus lies on the holder of the bill of lading, to prove that they have become the owners of the goods, and that the right to stop *in transitu* has gone. For this purpose it is not enough that they have become *bond fide* holders of the indorsed bill of lading for valuable consideration. A bill of lading is not, like a bill of exchange or promissory note, a negotiable instrument, which passes by mere delivery to a *bond fide* transferee for valuable consideration, without regard to the title of the parties who make the transfer. Although the shipper may have indorsed in blank a bill of lading deliverable to his assigns, his right is not affected by an appropriation of it without his authority. If it be stolen from him, or transferred without his authority, a subsequent *bond fide* trans-

freee for value cannot make title under it as against the shipper of the goods." Per Lord *Campbell*, C.J., 3 Ell. & Bl. 634.

If the assignee of a bill of lading acts *malá fide*; if, for instance, he had known that the consignee had been in insolvent circumstances, and that no bill had been accepted by him for the price of the goods, or that being accepted it was not likely to be paid; in that case the interposition of himself between the consignor and consignee, in order to assist the latter to disappoint the just rights and expectations of the former, would have been an act done in fraud of the consignor's right to stop *in transitu*, and would therefore be unavailing to the party taking an assignment of the bill of lading under such circumstances and for such a purpose." Per Lord *Ellenborough*, C.J., in *Cuming v. Brown*, 9 East, 514; see also *Wright v. Campbell*, 4 Burr. 2046; *Salomons v. Nissen*, 2 T. R. 674; *Schuster v. M'Kellar*, 7 Ell. & Bl. 704.

The mere fact that the indorsee of a bill of lading has notice that the vendor has not been paid, is not sufficient to render the transfer fraudulent. See *Cuming v. Brown*, 9 East, 506. In that case, in 1808, Jean, the vendor of goods, consigned them to Maine the purchaser, and sent him the bills of lading, and drew on him for the price. Afterwards Maine pledged the bill of lading to Cuming, who at the time was aware of these facts, but did not know that at that time Maine had stopped pay-

ment, and had not even any suspicion of his insolvency. It was held by Lord *Ellenborough*, C.J., that the vendor's right to stop *in transitu* was gone. "If," said his Lordship, "a bill of lading should be held by us not assignable under these circumstances, the consequence would be that no bill of lading could be deemed safely assignable before the goods arrived, unless the assignee of the bill of lading was perfectly assured that the goods were paid for in money, or paid for in account between the parties, which is the same thing; a position which would overturn the general practice and course of dealing of the commercial world on this subject. . . . The doubt which has been thrown on this subject has arisen principally from the words 'without notice,' which are to be found in the case of *Salomons v. Nissen* (2 T. R. 674), and other cases on the subject. But we think that, according to the general scope and meaning of the passages in the opinions of the judges where this expression occurs, it is not to be understood in the restrained sense contended for, viz. 'without notice that the goods had not been paid for;' but 'without notice of such circumstances as rendered the bill of lading not fairly and honestly assignable,' the criterion being, according to Mr. Justice *Buller* in that case (p. 681), *Does the purchaser take it fairly and honestly?*"

If there be a condition annexed to a bill of lading, as, for instance, if there be an indorsement making

the goods deliverable to the purchaser, "if he should accept and pay a draft," no indorsee, even for valuable consideration, will take any property in the goods unless the condition be fulfilled. *Barrow v. Coles*, 3 Campb. 92.

But where goods are put on board a vessel by the vendor for the account and at the risk of the vendee, and at the same time transmits and indorses a bill of lading to the vendee, the vendor parts with his property and right of possession, and will not be able to stop the goods *in transitu* on failure of the vendee to accept a bill according to agreement on the receipt of the invoice and the bill of lading (*Wilmshurst v. Bowker*, 7 Man. & Gr. 882; *Key v. Cotesworth*, 7 Exch. 595); if in such a case the vendor intends to preserve his right of property in the goods until the bill is accepted, he should transmit the bill of lading indorsed in blank, to an agent, to be delivered over only in case the bill is accepted. *Key v. Cotesworth*, 7 Exch. 595, 607.

The right of the vendor to stop goods *in transitu*, although defeated in law by the indorsement of a bill of lading for a limited purpose, as, for instance, to secure a sum of money, will remain in equity, subject to a lien for the indorsee's demand. This was first laid down in a case at law in the matter of *Westzinthus* (5 B. & Ad. 817), and it has since been recognized and followed in equity. See *Spalding v. Ruding*, 6 Beav. 376. There the plaintiffs con-

signed goods to Thomas, to whom a bill of lading was also sent. Thomas transferred the bill of lading to Ruding to secure £1,000. Thomas having afterwards stopped payment, notice was given by the agent of the plaintiffs to the master not to part with the goods. It was held by Lord Langdale, M.R., that the plaintiffs retained their right of stoppage *in transitu* subject to the lien of Ruding for the £1,000, and that their remedy against him for the surplus of the proceeds of the goods was in equity. "I apprehend it to be clear," said his Lordship, "that the indorsement and delivery of the bill of lading by Thomas the consignee to Ruding, for valuable consideration, gave to Ruding the legal right to the delivery, and possession of the goods. That right is not disputed by this bill, but the plaintiffs insist that under the contract subsisting between Thomas and Ruding the right to the possession of the goods was vested in Ruding, only as a security for the repayment to him of his advance and charges, and that, subject to that security, the plaintiffs in the consideration of a court of equity retained their right to a stoppage *in transitu* against the assignee or indorsee of the bill of lading; it appears that in the case of *Westzinthus* (5 B. & Ad. 817), the Court of Queen's Bench held that in such a case a court of equity would hold such a transfer to be a pledge or mortgage only, and that the attempt to stop *in transitu* gave a right to the goods in equity,

subject only to the lien for the advance. The propriety of that opinion was questioned, but, as it appears to me, without sufficient reason. As against Thomas, I think the plaintiffs had a right to stop the goods *in transitu*; and although the legal right to the goods was transferred with the bill of lading, yet I think that in equity the transfer took effect only to the extent of the consideration paid by the transferee, leaving in the plaintiffs an equitable interest in the surplus value."

It has been held that by the usage of trade, West India Dock warrants, indorsed *bonâ fide* and for good consideration, transferred the right of property in the goods like a bill of lading, so as to prevent the right of stopping *in transitu*. *Zwinger v. Samuda*, Holt's N. P. C. 395; *sed vide* S. C. 7 Taunt. 265; *M'Ewan v. Smith*, 2 H. L. Cas. 309; *Lucas v. Dorrien*, 7 Taunt. 278. But it is doubtful whether a document similar in form to a bill of lading, given by the master of a boat navigating an inland canal, has the effect of

such an instrument in transferring the property in the goods. *Bryans v. Nix*, 4 M. & W. 775.

The mere handing over of a shipping note or a delivery order by the consignee of goods to a third person will not pass the property in them so as to prevent a stoppage *in transitu*, for they will not amount to a bill of lading, which is similar to a bill of exchange, and the property in it passes by indorsement, but not by delivery without indorsement, whereas a shipping note, from its nature, is not indorsible. *Akerman v. Humphrey*, 1 C. & P. 53; *Tucker v. Humphrey*, 4 Bing. 523.

The right to stop *in transitu* is not affected by the Act to amend the Law relating to Bills of Lading, 18 & 19 Vict. c. 111. See sect. 2.

As to the right of factors to deal with bills of lading and other documents of title to goods and merchandise, see the Factor's Acts, 4 Geo. IV. c. 83; 6 Geo. IV. c. 94; 5 & 6 Vict. c. 39. See Smith's Leading Cases, vol. i. p. 652.

KRUGER v. WILCOX.

Jan. 25th and 27th, 1755.

[REPORTED AMBL. 252; S.C. 1 DICK. 269.]

LIEN.—*Factor gains a lien on goods consigned to him from his correspondent for the general balance of his account, as well as for the duties, etc., paid on account of the particular cargo so consigned to him: and this lien of the factor will remain even when the goods are turned into money. But if the factor parts with the possession of the goods to the owner, he loses the lien for the balance of accounts.*

A factor to whom goods had been consigned informed a broker employed by his principal that the principal would sell the goods himself, and gave an order to the warehouseman to deliver to the broker, who sold and made out the bills of parcels to the principal:—Held, that this amounted to a delivery in specie to the principal, and that the factor had lost his lien for his general balance.

This cause coming on for further directions, the case was as follows:—Mico was a general agent in England for Watkins, who was a merchant abroad, and at different times had received considerable consignments of goods, and upon the balance of accounts was in disburse. Afterwards Watkins consigned to him a parcel of logwood, for which he paid the charges, etc.¹ Watkins coming to England,

¹ "It appears from Lib. Reg. that upon the arrival of the ship, Mico ordered the logwood to be unloaded, and hired a warehouse to lodge it in; and that he employed Hudson, a broker, to sell it; but that before any sale was made, Watkins arrived in London, and acted in all respects as the owner; that afterwards Hudson applied to the plaintiffs to pur-

chase the logwood, which they agreed to do, and received part of it from the warehouse, and paid the amount of the purchase-money for that part to Hudson by the order of Watkins, after which Mico, suspecting the solvency of Watkins, who had become considerably indebted to him on account of previous business transacted for him as factor, served the plaintiffs

Mico said, as he was here, he might dispose of the goods himself. Watkins accordingly employs a broker to sell them, and Mico tells the broker that Watkins intends to sell them himself, to save commission, and Mico gave orders to the warehouseman to deliver the goods to that broker.

The broker sells them, and makes out bills of parcels to Watkins, and opens an account with Watkins, but takes no notice of Mico.

After the goods were sold, Mico begins to suspect Watkins's circumstances, and resorts to the broker to know whether he has opened an account with Watkins.

The great question in the cause was, supposing Mico had a lien on these goods and produce, so as to be entitled to retain them for the balance of the account, whether he has not parted with that right?

After argument at the bar, the Lord Chancellor adjourned the cause to the 27th, and desired the four merchants, who were examined in the cause on the different sides, might attend in Court, in order to be consulted by him upon the point. And accordingly this day they attended, viz.: Mr. Alderman Baker and Bethell, Mr. Willetts and Fonnereau; and after having asked them several questions upon the custom and usage of merchants relating to the matter in doubt, his Lordship gave his opinion with great clearness as follows:—

LORD HARDWICKE, Chancellor.—This is a case of bankruptcy, in which this Court always inclines to equality, yet if any person has a specific lien, or a special property in goods, which is clear and plain, it shall be reserved to him notwithstanding the bankruptcy.

with a notice not to pay any more of the purchase-money without his order. It was subsequently agreed by the assignees of Watkins, who had become bankrupt, and by Mico, that the plaintiffs should receive the rest of the logwood, and hold the purchase-money for the benefit of the persons who should appear to be entitled to it. The assignees having brought an action against the plaintiffs for the remainder of the purchase-money, the bill of interpleader in the present suit was filed. Mico had by the direction of Watkins effected the insurance on the cargo, and was in advance on this account to the

amount of £500; he had also paid to the captain of the ship by order of Watkins the sum of £160, and was otherwise under advance on account of the ship. The Master of the Rolls, at the original hearing, directed an account of what was due to Mico, an account of the insurance, advance to the captain, and ship's account, and for his costs of the suit, and that he should be paid what was due to him out of the money in the hands of the plaintiff. The case now coming on for further directions, the Lord Chancellor ordered the residue of the money to be paid over to the assignees of Watkins."—*Note to Blunt's Ed. of Amb.*

The question is whether in this case Mico is entitled to a specific lien, and consequently a preference in point of satisfaction out of the money arising by the sale of these goods?

Two things are to be considered :—

1st. What lien a factor gains on goods consigned to him by a merchant abroad? and whether Mico gained such lien in this case?

2nd. If he did, whether he has done anything to part with it?

As to the first. All the four merchants, both in their examinations in the cause and now in Court, agree, that if there is a course of dealings and general account between the merchant and factor, and a balance is due to the factor, he may retain the ship and goods, or produce, for such balance of the general account as well as for the charges, customs, etc., paid on the account of the particular cargo. They consider it as an interest in the specific things, and make them articles in the general account. Whether this was ever allowed in trover at law, where the goods were turned into money, I cannot say, nor can I find any such case. I have no doubt it would be so in this Court, if the goods remained in specie; nor do I doubt of its being so where they are turned into money.

To the second question, I am of opinion Mico has parted with his right, and that it is for the benefit of trade to say he has.

All the merchants agree, that although a factor may retain for the balance of an account, yet if the merchant comes over, and the factor delivers the goods up to him, by his parting with the possession he parts with the specific lien. Such is the law of the land as to retainers in other cases.

Question, whether this case amounts to the delivery up of the logwood to the principal? I think it does. Mico suffers Watkins to employ a broker, and tells the broker that Watkins intends to sell them himself, to save commission. Mico gives orders to the warehouseman to deliver the goods to the broker. The broker sells them, and makes out bills of parcels to Watkins, and takes no notice of Mico. It amounts to the same thing, as if Mico had delivered the goods in specie to Watkins.

It is safer for trade to hold it in this manner than otherwise; for by that manner of acting, Mico gave Watkins a credit with other people (for the sale was public, and by that the goods appeared to be Watkins's), which would not have been the case if Mico had retained for the balance of his account.

It is better to allow that which is the public notorious transaction, than that which is secret. Suppose an action had been

brought by Watkins against the broker for money had and received, the broker could not have defended himself by saying, So much is due to Mico.

The merchants have admitted that the specific lien as to the Customs charges, etc., does continue; even the law would have allowed it if the goods had remained *in specie*; the goods being sold makes the case stronger. But that is not now before me, being determined by his late Honour the Master of the Rolls, and acquiesced in by the parties.

CHASE AND OTHERS, ASSIGNEES OF WILLIAM AND
THOMAS HURST, BANKRUPTS, v. JAMES AND DAVID
WESTMORE.

Tuesday, May 21st, 1816.

[REPORTED 5 MAU. & SELW. 180.]

LIEN.—*A workman having bestowed his labour upon a chattel in consideration of a price fixed in amount by his agreement with the owner, may detain the chattel until the price be paid, and this though the chattel be delivered to the workman in different parcels and at different times, if the work to be done under the agreement be entire.*

Semble, that where the parties contract for a particular time or mode of payment, the workman has not a right to set up a claim to the possession inconsistent with the terms of the contract.

Trover for a quantity of wheat-meal, fine pollard, coarse pollard, and bran, together with some sacks which were stated in the first count of the declaration to be the property of the bankrupts, and in the second count, of the plaintiffs as their assignees.

On the trial before *Graham, B.*, at the Hants Spring Assizes, 1815, a verdict was found for the plaintiff for £1,200, subject to the opinion of the Court upon the following case:—

The bankrupts were, before their bankruptcy, in partnership as mealmen; the defendants were partners as millers. One of the

bankrupts, before the act of bankruptcy, applied to the defendants to grind a quantity of wheat, when it was agreed between them that the wheat should be sent by the bankrupts in their vessels, and that the defendants should grind it at 15s. per load, for which sum the defendants were to unload the wheat from the vessels, grind it, find sacks to manufacture it in, and return the meal, etc., when ground, into the bankrupts' vessels in the river near to which the mill was situated. About 19 loads of the wheat were sent at first, afterwards other quantities, making in the whole 146 loads. It was agreed that if any mixture was to take place, one of the bankrupts should correspond with the defendants on the subject, and, in fact, some of the grain was afterwards mixed at his request. At the time of the bankruptcy there remained in the defendants' possession 7 loads of wheat unground, 10 of meal produced by wheat which had been ground, 60 bushels of fine pollard, 20 bushels of coarse pollard, 20 bushels of bran, also produced from the wheat ground, and 80 sacks which had been delivered by the bankrupts to the defendants, for the purpose of being filled with the meal ground from the corn. The defendants, on demand made on the part of the plaintiffs after the bankruptcy, refused to deliver up this property.

And two questions were argued in the last Term, by *A. Moore* for the plaintiffs and by *Gifford* for the defendants:—First, whether the defendants had a right to detain this property for their general balance, under the statute 5 Geo. II. c. 30, s. 28. Secondly, whether they had a lien on it, in whole or in part, that is to say, for the balance due to them for grinding all the wheat which had been ground by them, or for the grinding only of such part as had been and remained ground in their hands at the time of the bankruptcy. Upon the last point it was argued for the plaintiffs, that a general lien, if it existed, should have been found as a part, or at least should clearly be deducible from the contract; that here the case was silent as to any lien, and the contract neither expressed nor implied any such right; on the contrary, it was stipulated that the defendants were to grind and return the wheat when ground; so that possession was to be given without reference to payment. And the rule laid down by Lord *Ellenborough*, in *Stevenson v. Blakelock* (1 Mau. & Selw. 543), was this, "that where there is an express antecedent contract between the parties, a lien which grows out of an implied contract does not arise;" so that by the special contract in this case, the general lien is gone: 2 Roll. Abr. tit. Justification, pl. 1, 2. Upon the first point, the case *Ex parte*

Ockenden (1 Atk. 235) was referred to; which was said to have been recognized by Lord *Mansfield* in *Green v. Farmer* (4 Burr. 2214) as a case which had been well considered; and although *Ex parte Ockenden* had been supposed adverse to *Ex parte Deaze* (1 Atk. 229), yet upon examination this would be found otherwise.

For the defendants it was argued, that there was not any authority to warrant the position, that, because a party stipulated for the price, he shall therefore be deprived of his right to detain until that price be paid. In *Stevenson v. Blakelock*, where payment was taken in bills, and thereby the time of credit was postponed, the lien was nevertheless held to exist. And this right may be enforced in respect of the whole work done, as in the case of the printer who was employed to print certain numbers, not all consecutive, of an entire work, and who was held to have a lien upon the numbers not delivered for his general balance (*Blake v. Nicholson*, 3 Mau. & Selw. 167.)

This was also an entire work. If the parties had sued upon the agreement, they must have averred that the price was tendered. So in this action they must prove that they were ready and willing to pay. Upon the second point, he referred to *Ex parte Deaze* (1 Atk. 229), where Lord *Hardwicke* expresses his opinion that "it is hard to say that mutual credit shall be confined to pecuniary demands." And to the remarks of *Gibbs, J.*, in *Olive v. Smith* (5 Taunt. 58).

Lord *Ellenborough, C. J.*, observed, that the Court did not think this case necessarily involved the doctrine of mutual credit; but on the other point, as it involved the consideration of several ancient authorities, the Court would take time to consider.

Cur. adv. vult.

LORD ELLENBOROUGH, C. J., now delivered the judgment of the Court.

This case was argued before us last Term, and stood over for our consideration, upon the single question whether a workman having bestowed his labour upon a chattel, in consideration of a price or reward fixed in amount by his agreement with the owner at the time of its delivery to him, can by law detain the chattel until the price be paid, or must seek his remedy by action, no time or mode of payment having been appointed by the agreement. We were all of opinion upon the argument, and still are, that if a right

to detain exists in the general case that I have mentioned, the present defendants have a right to detain the goods in question, for the money due to them for grinding all the wheat ; because we consider the whole to have been done under one bargain, although the wheat was delivered in different parcels and at different times.

The general question is of very great and extensive importance. Several authorities were referred to (which I shall hereafter notice) against the right to detain ; but if these authorities are not supported by law and reason, the convenience of mankind certainly requires that our decision should not be governed by them ; and we believe the practice of modern times has not proceeded upon any distinction between an agreement for a stipulated price and the implied contract to pay a reasonable price or sum ; and that the right of detainer has been practically acknowledged in both cases alike. In the case of *Wolf v. Summers* (2 Campb. 631), Mr. J. *Lawrence* does not appear to have been aware of any such distinction. It is impossible, indeed, to find any solid reason for saying that if I contract with a miller to grind my wheat at 15s. a load, he shall be bound to deliver it to me, when ground, without receiving the price of his labour, but that if I merely deliver it to him to grind without fixing the price, he may detain it until I pay him, though probably he would demand, and the law would give him the very same sum.

Certainly, if the right of detainer, considered as a right at common law (and it must be so considered in this case), exists only in those cases where there is no manner of contract between the parties except such as the law implies, this Court cannot extend the rule, and authorities were quoted to establish this proposition ; but upon consideration we are of opinion that those authorities are contrary to reason and to the principles of law, and ought not to govern our present decision. The earliest of them is to be found in 2 Ro. Ab., p. 92, which, however, is only a dictum of *Williams, J.* ; and it does not appear on what occasion it was pronounced, or that it governed the decision of any case. It is in these words, "If I put my clothes to a tailor to make, he may keep them until satisfaction for the making. T. T. 3 Ja. K. B. by *Williams, J.*" "But if I contract with a tailor, that he shall have so much for making my apparel, he cannot keep them until satisfaction for the making. T. T. 3 Ja. K. B. by *Williams, J.*" This distinction appears to have been acknowledged by Lord *Holt*, in a case of *Collins v. Ongly*, Selw. N.P. 1280, 4th edit., as quoted by *Rider*,

C. J., in the case of *Brenan v. Currint*. But the point was not in judgment before Lord Holt, and therefore the opinion then delivered by him, although entitled to great respect, has not the weight that would belong to a judicial decision of that very learned judge. The latter case of *Brenan v. Currint* is reported in Sayer, 224; and it is, as far as we can find, the only case wherein this distinction was made the foundation of the judgment of any Court. It was there carried to the extremest limit; for the contract was only to pay a reasonable sum, which is no more than the law would have implied if the parties had not expressed it. The opinion of *Popham, C.J.*, in the case of the *Hosteler*, Yelv. 66, has sometimes been cited, as an authority for this distinction, but the only distinction plainly expressed on that occasion applies to the sale of a horse for his keep, and not to a detainer of the animal; the Chief Justice there says, "That an innkeeper cannot sell a horse for his keep, where the price of it has been agreed upon, though he may do so if there has been no agreement for the price," but the power of sale in the case there put has been since denied. See *Jones v. Pearle*, 1 Stra. 556. The case in Yelverton was an action for the keep of the horse; and all that was said by the Chief Justice as to detainer and sale was extrajudicial. It was in the very same year, term, and Court, in which the opinion of *Williams, J.*, is said to have been delivered; and if, as seems very probable, his opinion was delivered on this occasion, it was extrajudicial also. The case of *Chapman v. Allen*, Cro. Car. 271, has also been quoted on this subject; that case, however, does not appear to have been decided on the ground supposed; but rather on the ground that a person taking in cattle to agist could not detain until the price be paid; or if he could in general do so, yet that in the particular case the defendant was guilty of a conversion as against the plaintiff, who was a purchaser of the cattle, by having delivered them over to a third person, on receiving from such third person the amount of his demand. In *Cowell v. Simpson* (16 Ves. 275) the Lord Chancellor considers a lien as a right accompanying an implied contract; and in one passage of his judgment he is reported to have said, "If the possession commences under an implied contract, and afterwards a special contract is made for payment, in the nature of the thing, the one contract destroys the other;" but it is evident, from other parts of the report, that the Lord Chancellor was there speaking of a special contract for a particular mode of payment. Such a contract is apparently inconsistent with a right to detain the posses-

sion, and consequently will defeat a claim to the exercise of such a right. And we agree that where the parties contract *for a particular time or mode of payment*, the workman has not a right to set up a claim to the possession inconsistent with the terms of his contract. And if *Williams, J.*, is to be understood to speak of a contract *for the time*, as well as the amount of payment, his opinion will not be contrary to our present judgment; and the authorities built upon it will have been founded on a mistake. And we are inclined to think that he must have intended to express himself to that effect; because the earliest authority that we have met with mentions an agreement for the time of payment, but makes no distinction between an implied contract and a contract for a determinate price. This authority is in the Year-Book, Easter Term, 5 Edw. IV. fol. 2, b. "Note also by *Haydon*, that an *hosteler* may detain a horse, if the master will not pay him for his eating. The same law is, if a tailor make for me a gown, he may keep the gown until he is paid for his labour. And the same law is, if I buy of you a horse for 20*s.* you may keep the horse until I pay you the 20*s.*; but if I am to pay you at Michaelmas next ensuing, here you shall not keep the horse until you are paid." In this passage the law, as applied to the cases of the *hosteler*, the tailor, and the vendor, is said to be the same, and in the latter the sum is supposed to be fixed. The distinction drawn is where *a future time of payment is fixed*. If so material a distinction as that which depends upon fixing the amount of the price had been supposed to exist at that time, we think it would have been noticed in this place; and not being noticed, we think it was not then supposed to exist. So in the case of *Cowper v. Andrews* (Hobart's Rep. 41). Lord *Hobart*, speaking of the word "pro," "for," says that this word "works by condition precedent in all personal contracts. As if I sell you my horse *for* ten pounds, you shall not take my horse except you pay me ten pounds, 18 Edw. IV. 5, and 14 H. VIII. 22, except I do expressly give you day; and yet, in this case, you may let your horse go, and have an action of debt for your money; and so may the tailor retain the garment till he be paid for the making, by a condition in law." The reason in the case of sale is given in the 14th Hen. VIII. 20 a: "The cause is, for that each has not the same advantage the one against the other; for the one will have the thing in possession, the other, but an action, which is not reason, nor the same advantage."

Considering the operation of the word "*for*," as noticed by Lord

Hobart, whose opinion is confirmed by the cases he refers to, and by others also, no reason can be assigned for saying that it shall not have the same effect in a contract to grind a load of wheat for 15s., as in a contract to sell a load of wheat for £15. The former, indeed, is in substance a sale of a certain portion of the time and labour of the miller and of the use of his machinery. And as it is clear that the miller could not maintain an action upon the contract without averring that he had ground and was ready to deliver the wheat, if the other party can by law recover the wheat without averring that he had paid or tendered the price of the grinding, he will have an advantage above the miller; for he will have his goods, and the miller will only have an action.

If the distinction which has been contended for on the part of the plaintiff should be allowed, what must be said in those cases where a workman is not only to bestow a portion of his labour on a chattel delivered to him, but also to apply to it some materials or goods of his own, for a fixed price? As in the case of a picture-frame sent to be gilded or varnished, and even in the old case of cloth sent to a tailor to be made into a garment, is the chattel to be retained by the workman, on the ground of his having applied to it his paint or varnish or thread or other materials, or must he deliver these to his employer without payment, because he has bestowed his own personal labour in addition to them?

Upon the whole, we think this supposed distinction is contrary to reason, and to that principle in the law which requires the payment of the price and the delivery of the chattel to be concurrent acts, where no day of payment is given; and, therefore, we think the case of *Brenan v. Currin* and the dicta on which it appears to have been founded are not law, and that the judgment in the present case must be for the defendants.

Postea to the defendants.

Kruger v. Wilcox and *Chase v. Westmore* are printed together, as being two of the most important judgments delivered upon the doctrine of lien, which may be defined as being a right which a person

has to retain that which is lawfully in his possession belonging to another, till certain pecuniary demands of him the person in possession are satisfied. *Hammonds v. Barclay*, 2 East, 235.

That the possession must in its origin be lawful is clear, for a creditor cannot tortiously seize his debtor's goods and then claim to retain them by virtue of a lien. See *Taylor v. Robinson*, 2 J. B. Moo. 730; *Nichols v. Clent*, 3 Price, 547; *Sunbolf v. Alford*, 3 M. & W. 248.

Before examining, as will be done hereafter somewhat in detail, in what manner liens are created or arise, it may be here observed that they are divisible into two great classes, viz. "*particular* liens, and *general* liens. *Particular* liens are where persons claim a right to retain goods in respect of labour or money expended upon them; and those liens are favoured in law. *General* liens are claimed in respect of a general balance of account; and these are founded in custom only, and are therefore to be taken strictly." *Houghton v. Matthews*, 3 Bos. & P. 494, per Heath, J.

The principal case of *Chase v. Westmore* falls within the first class of cases, for there it was held that the miller had a right to retain the meal, pollard, and bran which arose from the labour which he had expended upon the wheat delivered to him to be ground, until he was paid the sum due to him for grinding such wheat.

The principal case of *Kruger v. Wilcox* is a good illustration of the second class of cases, for there it was laid down for the first time in a court of justice (what appears before to have been doubtful, see *Green v. Furmer*, 4 Burr. 2218),

that a factor to whom goods have been consigned has not merely a right to retain them until he has been paid all charges which he may have incurred or which he can claim in respect of those particular goods, but he has also a lien upon them for the general balance due to him as factor in respect of dealings with other goods no longer in his hands. It is true that in *Kruger v. Wilcox* the lien claimed in respect of the general balance due to the factor was not enforced, but it was for this reason—that he had delivered up to his principal the goods upon which he claimed a lien, and therefore by his own act he had put an end to the right which he would otherwise clearly have had.

Having made these preliminary remarks, we may examine liens arising in various ways, but which are all referable to one or other of these two classes of liens—*particular* or *general*, as before mentioned; the most convenient order will be as follows, to consider—1st. Liens at common law. 2nd. Liens arising by express contract. 3rd. Liens arising by implication, either from the usage of trade or from the manner of dealing between the parties; and 4th. How the right to a lien may be lost.

1st. *As to Liens at Common Law.*—The first kind of lien which seems to have been recognized at common law, was that of innkeepers and common carriers, for as it is compulsory upon the former to receive guests and their goods, and

upon the latter to convey all goods tendered if there be room for them, it is but just that they should be entitled to retain them by way of indemnity (*Skinner v. Upshaw*, Ld. Raym. 752); *Smith v. Dearlove*, 6 C. B. 132; and it is immaterial in either case that the goods belong to another person, for if they had no notice they will still have a lien upon or right to detain them until they have been paid their just charges. This is well put in the case of *Yorke v. Grenough*, Ld. Raym. 867, where it is said, supposing a traveller be a robber and had stolen a horse, yet if he comes to an inn, and is a guest there, and delivers the horse to the innkeeper (*who does not know it*) the innkeeper is obliged to accept the horse, and then it is very reasonable that he should have a remedy for payment, which is by retainer. And he is not obliged to consider who is the owner of the horse, but whether he who brings him is his guest or not. And *Holt*, C. J., cited the case of the Exeter carrier (Ld. Raym. 867), where A. stole goods and delivered them to the Exeter carrier to be carried to Exeter; the right owner finding the goods in possession of the carrier, demanded them of him, upon which the carrier refused to deliver without being paid for the carriage. The owner brought trover, and it was held he might justify detaining them against the right owner for the carriage, for when A. brought them to him, he was obliged to receive them and carry them; and therefore, since the law compelled him

to carry them, it would give him remedy for the premium due for the carriage."

Upon the same principle, in the recent case of *Turrill v. Crawley*, 13 Q. B. 197, it was held that an innkeeper had a lien on a carriage brought to the inn by a guest for its standing-room, though the carriage, being merely a *hired one*, belonged to a third party. "Doubts," said *Wightman*, J., "have been suggested as to the innkeeper's lien on the goods of a third person; and the doubts of judges in former times have been referred to. The judges were equally divided in the first case (*Skipwith v. —*, 1 Bulst. 170; 3 Bulst. 271); then in the next case (*Robinson v. Walker*, 3 Bulst. 269; S. C. 1 Roll. Rep. 449; Poph. 127) there were three to one in favour of the lien; and in subsequent cases these doubts disappear altogether. In *Johnson v. Hill* (3 Stark. N. P. 172) it was stated by counsel to have been 'held by all the judges that even in the case where a robber had brought a horse which he had stolen to an inn,' the innkeeper had a lien for its keep against the owner; and *Abbott*, C. J., said he had no doubt as to the law as stated. I can see no distinction between a carriage and a horse for the purposes of this question. An innkeeper may charge for the standing of a carriage as well as for the meat of a horse, and his lien is as good in the one case as the other." See also *Snead v. Watkins*, 1 C. B. N. S. 267.

But the lien of an innkeeper will not extend to goods not

brought to the inn by a traveller *as his own goods*, either upon his coming to or whilst staying at the inn, but which had been furnished for his temporary use by a third person, and are known by the innkeeper to belong to that person. *Broadwood v. Granara*, 10 Exch. 417.

An innkeeper has not any right to take the clothes from the person of his guest in order to secure the payment of his bill, "for if he had, then if the innkeeper take the coat off his back, and that prove to be an insufficient pledge, he may go on and strip him naked, and that would apply either to a male or female, a consequence so utterly absurd that it could not be entertained for a moment." *Sunbolf v. Alford*, 3 Mees. & W. 248, 254. *A fortiori*, an innkeeper has no right to detain the *person* of his guest, for "that would give him a right to imprison a poor guest perpetually." *Id.*; and see *Wolf v. Summers*, 2 Campb. 631, overruling the dictum of *Eyre, J.*, in *Newton v. Trigg*, 1 Show. 269; *Ward v. Clark*, 9 Wentworth's Pleader, 362.

The lien of an innkeeper gives him in general only a right to detain the goods of the guest, but by the custom of London and Exeter, when a horse has eaten out its worth, the innkeeper may, upon the reasonable appraisement of four of his neighbours, sell it or take it as his own. *Mosse v. Townsend*, 3 Bulst. 271; Bac. Abr. tit. "Inns and Innkeepers," D. 451. *Robinson v. Walter*, 3 Bulst. 269.

As the lien of an innkeeper is only a particular lien, if he suffers his guest to depart without paying him his demand, taking his goods with him, such as horses, carriages, or luggage, he cannot at any subsequent period detain those goods of his guest for the same demand, but can only proceed to enforce it by action at law. *Jones v. Thurlow*, 8 Mod. 172; *Warbrook v. Griffin*, 2 Brownl. 254; *Jones v. Pearle*, 1 Stra. 557, and 6 East, 25 n.

An innkeeper does not lose his lien on the goods of his guest by letting him go away without paying his bill, for the innkeeper never wants to assert his right of lien until the customer goes off without paying. *Snead v. Watkins*, 1 C. B. N.S. 267, 272.

The right of lien of an innkeeper depends upon the fact that the goods came into his possession in *his character of innkeeper as belonging to a guest*. Where therefore an innkeeper had received horses and a carriage *to stand at livery*, the circumstance that the owner at a *subsequent period* occasionally took refreshment at the inn, or sent a friend to be lodged there at his charge, was held not to entitle the innkeeper to a lien in respect of any part of his demand. *Smith v. Dearlove*, 6 C. B. 132; see *Parsons v. Gingell*, 4 C. B. 545.

An innkeeper cannot detain goods as a security for the payment of the reckoning for beer and ale drunk by a guest, unless the requirements of the stat. 11

& 12 Will. III, c. 15, as to selling beer in stamped vessels, and rendering an account of the number of quarts and pints drunk, have been complied with.

The landlord of an inn has a lien for money lent to his guest, if it was agreed between them at the time of the loan that the guest's goods should be a security for the sum lent. *Proctor v. Nicholson*, 7 Car. & P. 67.

The lien of a common carrier being a common law lien, he cannot, in the absence of express contract or usage from which a contract may be implied, detain the goods of his employers for anything beyond the price of the carriage of the goods so conveyed. *Skinner v. Upshaw*, Lord Raymond, 752; *Rushforth v. Hadfield*, 6 East, 519; 7 East, 224.

The right of a common carrier to retain goods for his general balance may be established by proving a general usage, but the claim is not encouraged by the courts. Thus in *Aspinall*, assignee of *Howarth*, v. *Pickford*, 3 Bos. & P. 44 n., in an action of trover for goods before Lord *Kenyon*, the defence was that the goods were put by *Howarth* into the hands of the defendant as a carrier, to be forwarded from Manchester to his warehouse in London, and that the defendant was entitled to retain against the estate for the general balance due from *Howarth* for the carriage of goods. This right was established by evidence of the defendant having before claimed and been allowed to retain for his general

balance both against bankrupt estates and solvent customers, and also by evidence of the principal carrier on the western road to the same effect respecting himself. In the subsequent case of *Rushforth v. Hadfield* (6 East, 519; 7 East, 224), the usage for the carriers to have a lien for their general balance was not proved, and the claim of carriers for a lien for their general balance was viewed with much disapprobation by the Court of Queen's Bench. Lord *Ellenborough*, C.J., said: "Growing liens are always to be looked at with jealousy, and require stronger proof. They are encroachments upon the common law. If they are encouraged, the practice will be continually extending to other traders and other matters. . . . It is not for the convenience of the public that these liens should be extended further than they are already established by law. But if any particular inconvenience arise in the course of trade, the parties may, if they think proper, stipulate with their customers for the introduction of such a lien into their dealings. But in the absence of any evidence of that sort to affect the bankrupt, I think the jury have a right in negating the lien claimed by the defendants on the score of general usage." See also *Holderness v. Collinson*, 7 B. & C. 212.

A carrier may indeed, by contract or by giving notice of which his employer is cognizant, detain his goods for his general balance; but he cannot by giving any such

notice affect the interest of third parties. See *Wright v. Snell*, 5 B. & Ald. 350: there a carrier had given notice that "all goods would be considered subject to a lien, not only for the freight of such particular goods, but also for any general balance due from their respective owners." Goods having been sent by the carrier to the order of a mere factor, it was held by the Court of Queen's Bench that the carrier had not as against the real owner any lien for the balance due from the factor. "Where," said *Abbott, C. J.*, "goods are consigned to A.B. or order, the carrier has a right to consider A.B. as the owner of the goods for the purpose of delivery, but not for the collateral purpose of creating a lien on the goods as against the owner, in respect of a general balance due from the consignee; nor will any prejudice arise to the carrier from our holding this to be the law, for he need not deliver the goods in any case till the price of the carriage of them is paid."

Upon the same principle it has been held, that although a common carrier may have acquired by usage or special agreement a lien for a general balance of account between him and a consignee, this lien shall not affect the right of the consignor to stop *in transitu*: that is in effect that this right of general lien shall not operate upon or against the rights of third persons. *Oppenheim v. Russell*, 3 Bos. & P. 42; and see *Leuckhart v. Cooper*, 3 Bing. N. C. 107.

A carrier cannot claim a lien on

goods for booking or warehouse-room when they have not been booked, and where they have only been taken from the waggon to the scales, in order to weigh them so as to ascertain the sum to be paid by the owner. *Lambert v. Robinson*, 1 Esp. 119.

Where by the custom of a particular trade a carrier is to be paid for the carriage of goods by the consignor, he has no right to detain them against the consignee, who has paid the price of them, for a general balance due the carriage of other goods of the same sort sent by the consignor. *Butler v. Woolcott*, 2 Bos. & P. N. R. 64.

As to the lien of a coach proprietor on luggage, see *Middleton v. Fowler*, 1 Salk. 282; *Higgins v. Bretherton*, 5 C. & P. 2.

A shipowner has a lien upon the cargo for freight properly so called, that is for the carriage, conveyance, and delivery of goods (*Sodergren v. Flight*, 6 East, 622, cited; *Gladstones v. Allen*, 12 C. B. 202; *Campion v. Colvin*, 3 Bing. N. C. 17, 26; *How v. Kirchner*, 11 Moo. P. C. C. 34), but not in the absence of express stipulation for dead freight demurrage (*Phillips v. Rodie*, 15 East, 547), wharfage (*Bishop v. Ware*, 3 Campb. 860), or port charges (*Faith v. East India Company*, 4 B. & Ald. 630) or in respect of breaches of covenant, other than those relating to the payment of freight for goods actually carried, *Birley v. Gladstone*, 3 Mau. & Selw. 205; *Gladstone v. Birley*, 2 Mer. 401; *Faith v. East India Company*, 4 B. & Ald. 630.

The lien of a shipowner will not be confined to the charterer's goods, where the freight regulated by the tonnage of the vessel is payable by the charterer for her use, but will extend to goods consigned to others. *Campion v. Colvin*, 3 Bing. N. C. 17; and *Fuith v. East India Company*, 4 B. & Ald. 630.

Where the ship has been employed by the freighter as a general ship for the goods of subfreighters, they will be liable to the lien to the amount only of the freight they have contracted to pay. *Fuith v. East India Company*, 4 B. & Ald. 630; *Mitchell v. Scaife*, 4 Campb. 298; and see *Michenson v. Begbie*, 6 Bing. 190, and *Paul v. Birch*, 2 Atk. 621; *Alsager v. St. Katherine's Dock Company*, 14 M. & W. 794; *Lucas v. Nockells*, 4 Bing. 729.

The lien will however be destroyed if the shipowner has entered into a contract inconsistent with it, as, for example, where the contract is to pay *after* the delivery of the cargo. *Hou v. Kirchner*, 11 Moo. P. C. C. 21, 34; *Alsager v. St. Katherine's Dock Company*, 14 M. & W. 794; *Lucas v. Nockells*, 4 Bing. 729.

So when by the terms of the charter-party the freighter has a right to the goods, upon his giving good and approved bills for the freight to the owners of the ship, upon the negotiation of a bill given by the freighter to the shipowners the latter will lose their lien, even although they may have expressed their disapprobation of the bill (*Horncastle v. Farran*, 3 B. & Ald. 497); but where the freight is to be paid at the port of discharge

within a month *from the sailing of the ship*, that will not amount to a waiver of the right to a lien on the cargo by the shipper. *Gilkinson v. Middleton*, 2 C. B. N. s. 134; and see *Neish v. Graham*, 8 Ell. & Bl. 505.

As possession of the goods is essential to the existence of the right to a lien upon them, at any rate in the absence of a contract preserving it, it follows that when the owner of a ship demises it, and so gives up the possession of the vessel to the charterers, so that the master is the agent for the charterer and not the servant of the owners, the latter will have no lien on the goods for the earnings of the ship. The solution of the question whether the owner has parted with the possession of the ship depends upon the construction of the charter-party, a question upon which *Tindal*, C.J., made the following important observations: "It must be admitted," said his Lordship, "that there is some contradiction in the authorities bearing upon this point, viz. the right of lien in the owners of the ship, and that in the later cases the terms of actual demise have not been considered as affording so decisive a criterion of the intention of the contracting parties as was supposed to belong to them in the case of *Hutton v. Bragg* (7 Taunt. 14; 2 Marsh. 339). But when the several cases are closely examined, it will be found that the apparent conflict of authorities in this instance, as in all other questions arising upon the construction of written instruments,

arises more from the variety of terms employed by the parties themselves in framing their contracts than from difference of opinion in the judges who interpret them; for in each of the cases in which the owner's lien has been supported, notwithstanding the terms of express demise, other stipulations will be found sufficient to rebut the inference that the owners meant to part with the possession of the ship. Thus in *Mitchell v. Scaife* (4 Campb. 298), *Birley v. Gladstone* (3 Mau. & Selw. 205), *Yates v. Railston* (8 Taunt. 293; 2 J. B. Moo. 294), and *Christie v. Lewis* (2 Brod. & B. 410; 5 J. B. Moo. 211) there were terms that showed that the payment of the hire was to be either precedent to or concomitant with the delivery of the goods, whereas in *Smalle v. Moates* (9 Bing. 574; 2 M. & Scott, 674), the lien of the owner was expressly reserved by the charter-party. In each case the whole contract must be taken together, and due effect given to the several clauses that counteract or qualify each other; and thus it often happens that the same expression will bear different meanings, and require a different interpretation, according to the context of the instrument in which they are found." See *Belcher v. Capper*, 4 Man. & Gr. 540; *Tate v. Meek*, 8 Taunt. 280. The fact that the owners have appointed the master does not afford any presumption that they intend to retain possession of the vessel. *Newberry v. Colvin*, 7 Bing. 190;

C. & F. 283; *Campion v. Colvin*, 8 Bing. N. C. 17; *Marquand v. Banner*, 6 Ell. & Bl. 232.

As to what is sufficient to show an intention on the part of the owners to give up possession of the ship, see *The Trinity House v. Clark*, 4 Mau. & Selw. 288; *Fletcher v. Braddick*, 2 Bos. & P. N. R. 182; *Parish v. Crawford*, 2 Stra. 1251; *Vallejo v. Wheeler*, 1 Cowp. 143; *Reeve v. Davis*, 1 Ad. & Ell. 312; *Fenton v. Dublin Steam Packet Company*, 8 Ad. & Ell. 835.

The master being turned out of possession upon the vessel's being captured, does not deprive him of his lien for the freight in case of her recapture. Thus where a vessel was captured and the master was taken out, and afterwards she was recaptured, it was held that this removal from possession made no difference, and that the shipowner on her arrival received the vessel as trustee for the master, and that consequently his lien for freight still existed. *Ex parte Cheeseman*, 2 Eden, 181.

The shipowner's lien will remain over goods placed in bond warehouses without payment of the custom dues, it being expressly reserved by the warehousing Acts, 8 & 9 Vict. c. 91, s. 51; 3 & 4 Will. IV. c. 57, s. 47; 6 Geo. IV. c. 112, s. 45; and see 7 & 8 Vict. c. 31, as to goods carried inland and placed in bonded warehouses at Manchester.

In connection with this subject, it may be here mentioned that an underwriter who has paid a shipowner a sum of money on account

of damages sustained by a collision, has a lien upon the sum which the shipowner may recover for damages, and may file a bill in equity to restrain the owner of the ship which has occasioned the damage from paying the sum recovered to the insurer. *White v. Dobinson*, 14 Sim. 273; and see *Randal v. Cockran*, 1 Ves. 98; *Blaauwpot v. Da Costa*, 1 Eden, 180; *Brooks v. Macdonnell*, 1 Y. & C. Exch. Ca. 500.

Upon principles of public policy and commercial necessity, the common law has given a lien for salvage, that is to say where a person by his own labour preserves goods which the owner or those entrusted with the care of them have either abandoned in distress at sea or are unable to protect and secure, he may retain possession of the goods saved until proper compensation is made to him for his trouble. *Abbott, Shipp.* 453, 9th ed.; and see *Hartfort v. Jones*, 1 Lord Raym. 893; *Nicholson v. Chapman*, 2 H. Black. 254; *Baring v. Day*, 8 East, 57.

A lien at common law, of which instances are to be found in our oldest Reports, is that where a bailee has expended his labour and skill in the improvement of a chattel delivered to him, for he can detain it for his charge in that respect. "Thus the artificer to whom the goods are delivered for the purpose of being worked into form; or the farrier by whose skill an animal is cured of a disease; or the horsebreaker by whose skill he is rendered manageable,

have liens on the chattels in respect of their charges." Per *Parke, B.*, in *Scarfe v. Morgan*, 4 M. & W. 283. So a shipwright to whom a ship has been delivered up to be repaired (*Franklin v. Hosier*, 4 B. & Ald. 341); a printer to whom paper has been delivered to be printed upon (*Blake v. Nicholson*, 3 M. & Selw. 167); a miller to whom corn has been delivered to be ground (*Chase v. Westmore*, 5 M. & Selw. 180); a tailor to whom cloth has been delivered to be worked up into a garment (Y. B. 5 Ed. IV. fol. 2; Yelv. 67; *Cowper v. Andrews*, Hob. 42; *Chapman v. Allen*, Cro. Car. 271; *Hussey v. Christie*, 9 East, 433), have all of them a lien for their charges, whether they be fixed by express contract or depend upon the implied contract to pay a reasonable sum. *Chase v. Westmore*, 5 M. & Selw. 184. So likewise a trainer will have a lien for the expense of keeping and training a racehorse (*Bevan v. Waters*, M. & Malk. 236); and the owner of a stallion upon the mare which has been covered (*Scarfe v. Morgan*, 4 M. & W. 270).

All such specific liens being consistent with the principles of natural equity, are favoured by the law, which is construed liberally in such cases. Per *Parke, B.*, in *Scarfe v. Morgan*, 4 M. & W. 283.

Where however a bailee does not confer any additional value on an article, either by the exertion of any skill of his own, or indirectly by means of any instrument in his possession, he will have no

lien. Thus it has been held that an agister, or person who receives horses, cows, or other cattle to pasturage, will not in the absence of contract be entitled to a lien for the pasturage. *Chapman v. Allen*, Cro. Car. 271; *Jackson v. Cummins*, 5 M. & W. 342; *Stone v. Lingwood*, 1 Str. 651.

Upon the same principle a livery-stable keeper has been held to have no lien on a horse delivered to him to be stabled and fed. *Wallace v. Woodgate*, R. & M. 193. In *Judson v. Etheridge* (1 Crompt. & M. 743; 3 Tyrw. 954), to a count in detinue for detaining a horse, the defendant pleaded that the plaintiff had delivered the horse to him to be stabled and taken care of and fed, and kept by him for the plaintiff for reward, and that £10 became due as a reasonable reward, and so justified the detainer for that sum; but it was held by the Court of Exchequer on general demurrer, that the plea was bad, and that he had no lien. "The present case," said *Lyndhurst*, C.B., "is distinguishable from the cases of workmen and artificers, and persons carrying on a particular trade, who have been held to have a lien, by virtue of labour performed in the course of their trade, upon chattels bailed to them. The decisions on the subject seem to be all one way. In *Chapman v. Allen* (Cro. Car. 271) it was decided that a person receiving cattle to agist had no lien. In *York v. Greenough* it was held, not merely by Lord Chief Justice *Holt*, but by the

whole Court in their decision, that a livery-stable keeper had no lien. As to the case of *Jacobs v. Latour* (2 M. & P. 201; S. C. 5 Bing. 130), that, so far from establishing the right of lien, confirms the former decisions, for Lord Chief Justice *Best* expressly draws the distinction between a trainer who bestows his skill and labour, and a livery-stable keeper—between horses taken in by a trainer and altered in their value by the application of his skill and labour, and horses standing at livery without such alteration. When the case came on before the Court of Common Pleas, that distinction seems to have been supported. It appears to me that the present case is decided by the concurrence of all the authorities." See also *Orchard v. Rackshaw*, 19 L. J. C. P. 303; *Sanderson v. Bell*, 2 C. & M. 304; 4 Tyrwh. 244.

An artificer, who in exercise of his right of lien, detains a chattel in the making or repairing of which he has expended his labour and materials, has no claim against the owner for taking care of the chattel while it was so detained. See *The British Empire Shipping Company v. Somerset*, 27 L. J. 397, Q. B.; 6 W. R. 600: there a shipwright received a ship into his dock to be repaired (no separate charge being made for the use of the dock during the repairs), and the repairs being complete, he detained the ship in the dock until the charges were paid, giving notice to the owner that he should demand £21 a day for the use of the dock dur-

ing the detention. It was held by the Court of Queen's Bench that the shipwright was not entitled to any payment for dock-room during the detention. "This claim," said Lord *Campbell*, C.J., "appears to be quite novel, and on principle there is great difficulty in supporting it either *ex contractu* or *ex delicto*. The owner of a chattel can hardly be supposed to have promised to pay for the keeping of it while against his will he is deprived of the use of it; and there seems no consideration for such a promise. Then the chattel can hardly be supposed to be wrongfully left in the possession of the artificer, when the owner has been prevented by the artificer from taking possession of it himself. If such a claim can be supported, it must constitute a debt from the owner to the artificer, for which an action might be maintained. When does this debt arise, and when is the action maintainable? It has been held that a coachmaker cannot claim any right of detainer for standage, unless there be an express contract to that effect, or the owner leaves his property on the premises beyond a reasonable time, and after notice has been given to him to remove it. *Hartley v. Hitchcock* (1 Stark. 408.) The right of detaining goods on which there is a lien is a remedy to the party aggrieved, which is to be enforced by his own act; and where such a remedy is permitted, the common law does not seem generally to give him the costs of enforcing it.

Although the lord of a manor be entitled to amends for the keep of a horse which he has seized as an estray (*Henly v. Walsh*, 2 Salk. 689), the distrainer of goods which have been replevied cannot claim any lien upon them. *Bradyll v. Ball* (1 Bro. C. C. 427.) So where a horse was distrained to compel an appearance in a hundred count, it was held that after appearance the plaintiff could not justify detaining the horse for his keep. (Buller's *Nisi Prius*, 45.) If cattle are distrained damage-feasant, and impounded in pound overt, the owner of the cattle must feed them; if in a pound covert, or close, the rule is laid down in the words of Lord *Coke*, 'The cattle are to be sustained with meat and drink at the peril of him that distraineth, and he shall not have any satisfaction therefore.' Co. Litt. 47, b." See 8 C. affirmed in the Exch. Chamber, 5 Jur. n.s. 675; 7 W. R. Ex. c. 287.

Whenever a lien cannot be established as existing at common law, it must arise either from express contract, or from usage from which a contract will be implied; and if no such contract can be shown the claim to a right of lien will fail. See *Naylor v. Mangles*, 1 Esp. 109; *Kirkman v. Shawcross*, 6 T. R. 14; *Pratt v. Vizard*, 5 B. & Ad. 808.

2. *As to Liens arising by express Contract.*—A lien may be created by express contract, and that is stated by an eminent judge to be the "strongest and surest ground

upon which the right of lien can in any case be placed." *Small v. Moates*, 9 Bing. 590. So likewise by express contract a right of lien may be in any way modified, either by extending, confining, or even by altogether excluding its ordinary operation. *Owenson v. Morse*, 7 T. R. 64.

A right to a lien may be excluded even without express words, by the terms of a contract or the usage in similar cases being inconsistent with the existence of such right. Thus as it is a well-established principle that without the right of continuing possession there can be no lien, it has been held that even if an agister had a lien for the agistment of milch cows, it would be excluded from the very nature of the subject-matter, inasmuch as the owner was to have possession of them during the time of milking. *Jackson v. Cummins*, 5 M. & W. 342, 350.

Upon the same principle it has been held by the Court of Queen's Bench, in the recent case of *Forth v. Simpson*, 13 Q. B. 680, that although the labour and skill employed on a race-horse by a trainer are a good foundation for a lien, nevertheless if by usage or contract the owner may send the horse to run at any race he chooses, and may select the jockey, the trainer has no continuing right of possession, and consequently no lien. "Here it appears," said *Patteson, J.*, "that the owner of the horses might send them to be ridden by a jockey of his own choice, at any race he chose. The trainer could

not refuse to deliver them to the owner for this purpose. This state of things is inconsistent with a lien; the trainer, as to the right of uninterrupted possession, was on the same footing with a livery-stable keeper, who it is admitted has no lien. An innkeeper's lien stands on a different principle: he has a lien on a guest's horse, because the law obliges him to take it in. My brother *Parke's* view of the trainer's lien, as stated by him in *Jackson v. Cummins* (5 M. & W. 351), exactly supports our decision, which is also quite consistent with his observation in the same case, that where a horse is to be trained for a specified race, the trainer may have a lien for his charges until the horse is given up." See also *Boardman v. Sill*, 1 Campb. 410 n.; *Walker v. Birch*, 6 T. R. 258; *Weymouth v. Boyer*, 1 Ves. Jun. 416; *Crawshay v. Homfray*, 4 B. & Ald. 50; *Lucas v. Nockells*, 10 Bing. 157.

So where an agreement has been entered into between the parties, that the work to be done, on account of which a lien is claimed, should be paid for in a particular manner and out of a particular fund, the right of lien might be lost in consequence of such agreement being inconsistent with it. *Pinnock v. Harrison*, 3 M. & W. 532, 539.

The mere existence however of a special agreement, as, for instance, for the payment of a fixed sum, for work to be done to a chattel, will not, as was clearly decided in the principal case of *Chase v. West-*

more, exclude the right of lien, its terms not being inconsistent with such right. See also *Hutton v. Bragg*, 2 Marsh. 345, 349; 7 Taunt. 25, overruling the doctrine laid down in *Brenan v. Currint*, Say. Rep. 224; *Collins v. Ongly*, Selw. N. P. 1280, 4th ed.

By contract a lien may be either particular or general. Thus in *Kirkman v. Shawcross*, 6 T. R. 14, an agreement had been entered into by a number of dyers, dressers, bleachers, etc., at a public meeting, that they would not receive any more goods to be dyed, dressed, bleached, etc., unless they should respectively have a lien on those goods for *their general balance*: it was held by the Court of King's Bench that a person *who having notice of such agreement* delivered his goods to one of such persons, being a bleacher, to be bleached, must be taken to have assented to these terms, and consequently could not demand back his goods without paying the balance of his general account.

A contract likewise by a common carrier with his customer, for a lien for his general balance is good (*Rushforth v. Hadfield*, 6 East, 527; 7 East, 228), and might, it seems, be implied by his giving a public notice that he would only carry upon such terms (*Wright v. Snell*, 5 B. & Ald. 353); the goods however of third parties, consigned to the customer, cannot be made liable under such an agreement for the general balance due from such customer to the carrier. *Brandao v. Barnett*,

2 Scott, N. C. 113; *Wright v. Snell*, 5 B. & Ald. 353.

Where however the law imposes an obligation upon a person carrying on certain trades or callings, to exercise them in favour of all persons indiscriminately, as is the case with common carriers and innkeepers, they will not be at liberty to refuse to carry goods or to receive guests except upon the terms of having a lien for their general balance. See Add. Contracts, 1183, 4th ed.

3. *As to Liens arising by Implication, either from Usage of Trade, or from the Manner of Dealing between the Parties.*—Having noticed liens arising from *express* contract, we may now proceed to examine liens resulting from *usage*, which depend upon implied contract. Thus in the principal case of *Kruger v. Wilcox*, it was held that a factor having by custom a lien upon goods entrusted to him for his general balance, there was an implied contract on the part of his principal that he should have that lien. And such lien will be supported both in the case of a home factor as in that of a foreign factor (*Houghton v. Matthews*, 3 Bos. & P. 485, 489; and see *Gardiner v. Coleman*, cited 1 Burr. 491; 6 East, 28 n.; *Man v. Shiffner*, 2 East, 523); but his claim is limited to those goods which come into his hands as factor, a point of law which should be borne in mind, where a factor claiming a lien for his general balance acts, for the person against whom he makes the claim,

and by whom he has goods entrusted to him, in different capacities. See *Dixon v. Stansfield*, 10 C. B. 398 : there A. and Co., who carried on business at Hull as merchants, factors, ship and insurance brokers, and general agents, had had various dealings, as *factors*, with B. and Co., of London. Whilst these dealings were going on between them, B. and Co. wrote to A. and Co., requesting them to get a policy of insurance effected for them on the ship *Exporter*, for a voyage from the Downs to South America, and thence to the West Indies. A. and Co. procured the insurance to be effected, and B. and Co. remitted to them the premiums—the policy remaining in the hands of A. and Co. It was held that A. and Co., as they had effected the policy as insurance-brokers, were not entitled to hold it as a lien for the general balance due to them, as *factors*, from B. and Co. “A man,” said *Jervis*, L. J., “is not entitled to a lien simply because he happens to fill a character which gives him such a right, unless he has received the goods, or done the act, in the particular character to which the right attaches. There is no evidence of usage, or course of dealing between the parties, to justify the claim of a general lien; and that there is no particular lien upon this policy is conceded, for it is admitted that the premiums due in respect of it have been paid.”

A factor has not only a general lien upon the goods entrusted to him in that capacity, while they

remain in his possession, but also on the *proceeds* of such goods which he has sold as factor. And, on the bankruptcy of the factor, his assignees will have the same rights as the bankrupt had before, the bankruptcy of the factor operating not to destroy the lien, but merely as a revocation of his authority as to receive any money on account of his principal. See *Hudson v. Granger*, 5 B. & Ald. 27. There the owner of goods being indebted to a factor in an amount exceeding their value, consigned them to him for sale. The factor being also similarly indebted to I. S., sold the goods to him. The factor afterwards became bankrupt, and on a settlement of the accounts between I. S. and the assignees, I. S. allowed credit to them for the price of the goods, and he then proved for the residue of his claim against the estate. It was held by the Court of King's Bench, that as the factor had a lien on the whole price of the goods, such settlement of accounts between the vendee and the assignees afforded a good answer to an action against the vendee for the price of the goods, brought either by or on account of the original owner. See also *Drinkwater v. Goodwin*, Cowp. 251.

It follows from what has been before stated, that a factor is not entitled to any general lien in respect of debts which arise prior to the time at which his character as factor commences. For the liens of factors have been allowed for the convenience of trade, and with

a view to encourage factors to advance money upon goods in their possession, or which must come to their hands as factors; but debts which are incurred prior to the existence of the relation of principal and factor, are not contracted upon this principle. And if the lien were allowed in such cases, instead of inducing persons to place goods in the hands of factors, it would operate the contrary way, since it would tend to prevent insolvent persons from employing their creditors as factors, lest the goods entrusted to them should be retained in satisfaction of former debts. See also *Walker v. Birch*, 6 T. R. 263; *Olive v. Smith*, 5 Taunt. 56; *Weldon v. Gould*, 3 Esp. 268.

It has also been held that packers have a lien for their general balance. See *Ex parte Deeze*, 1 Atk. 228; *Green v. Farmer*, 1 Black. Rep. 651; 4 Burr. 2222; *Savill v. Barchard*, 4 Esp. 53.

Bankers, by the usage of trade, which being part of the law merchant, and is therefore judicially noticed, have a general lien on all securities deposited with them as bankers by a customer (*Davis v. Bowsher*, 5 T. R. 488; *Bolton v. Puller*, 1 Bos. & P. 539; *Giles v. Perkins*, 9 East. 12; *Bosanquet v. Dudman*, 1 Stark. 1); even although in the case of negotiable instruments they may happen to be the property of a third party. See observations of Lord Campbell in *Brandão v. Barnett*, 3 C. B. 530.

The general lien, however, of

bankers will not exist if there be an express contract, or circumstances that show an implied contract, inconsistent with such lien. Where, for instance, securities are deposited with bankers for a special purpose inconsistent with the general lien, it cannot be successfully urged. Thus in *Brandão v. Barnett*, 3 C. B. 519; 12 C. & F. 787, Burn bought on account of Brandão, and with Brandão's money, certain exchequer bills, which Burn deposited in a box that he kept at his bankers, himself retaining the key. Whenever it became necessary to receive the interest on the exchequer bills, and to exchange them for new ones, Burn was in the habit of taking them out of the box, and giving them to the bankers for that purpose (such being the usual course of business), which being accomplished, the new exchequer bills were, as soon as conveniently might be, handed over to and locked up by Burn in the box, the amount of interest received by the bankers being passed to the credit of Burn's account. The exchequer bills themselves were never entered to Burn's account, nor had the bankers any notice or knowledge that they were not the property of Burn himself. On the 1st of December, 1836, Burn took the exchequer bills out of the box, and delivered them to the bankers, for the purpose of receiving the interest and exchanging them for new ones. The bills were accordingly exchanged; but the new bills (Burn being absent from business on ac-

count of illness) remained in the possession of the bankers down to the time of Burn's failure on the 23rd of January, 1837, his account in the meantime having been considerably overdrawn. In an action at the suit of Brandão, the true owner, it was held by the House of Lords, reversing the judgment of the Exchequer Chamber (see 1 M. & Gr. 903; 6 M. & Gr. 630), that the bankers had no lien upon these exchequer bills for the general balance due to them from Burn, although such securities are transferable by delivery, the circumstances under which they came to their hands being inconsistent with the existence of a general lien. "It is hardly denied," said Lord Campbell, "that if there had been an express undertaking by the defendants to exchange the bills, and return the new ones as soon as obtained to Burn, that he might lock them up, no lien would have been acquired. But the special verdict shows the course of dealing between the parties, and states facts which raise an implied promise on the part of the defendants, which operates as if it were express. This seems to me to be like the case put, of bank-notes given to a banker to procure a bank-post bill for a customer, or a promise by a purchaser to pay ready money, which excludes set-off. There can be no implied right against a positive obligation."

Upon the same principle a banker will not have a general lien upon securities deposited with him to secure a specific sum. See *Tan-*

derzee v. Willis, 3 Bro. C. C. 21: there a customer deposited with his bankers some securities to secure a sum of £1,000 which they advanced to him. These securities were frequently changed for others, and as one was taken away, another of equal value was deposited in its room. Afterwards, when the customer owed the £1,000, and also £400 on his banking account, in consequence of the bankers requiring an assignment of the securities, the customer executed a bond and a deed poll for securing the £1,000. After the execution of these securities the customer overdraw his account, and was at the time of his death indebted to the bank in the sum of £541 over and above the £1,000. On a bill being filed by the representatives of the customer, a decree for redemption was made by Lord *Thurlow*, C., on payment of the £1,000 and interest, although the bankers insisted upon their right to retain the securities for the amount of their whole demand. This decree is clearly right, for it was evidently the intention of the parties to confine the security of the deposit to the £1,000, inasmuch as when it was made a larger sum, to which it might readily have been extended, was then due. See however and consider the case of *Jones v. Peppercorne*, 7 W. R. 103, V. C. W.

A banker will have no lien on the deposit of a partner on his separate account for a balance due to the bank from another firm of which he is a member (*Watts v. Christie*,

11 Beav. 546), nor will he have any lien on muniments of title left casually or by mistake in his place of business after he has refused to advance money on them as a security. *Lucas v. Dorrien*, 7 Taunt. 278.

A policy broker will have a lien against his employers for his general balance, even although they be merely agents for another person, if they did not actually disclose their principal (*Mann v. Forrester*, 4 Campb. 60; *Westwood v. Bell*, ib. 349; *Bell v. Jutting*, 1 J. B. Moore, 155), or do in effect the same thing by indicating to the policy broker that they were acting as agents for another party. *Maans v. Henderson*, 1 East, 335; *Snook v. Davidson*, 2 Campb. 218. The principle on which these cases proceed is well explained by *Gibbs, C.J.* "If," he says, "goods are sold by a factor in his own name, the purchaser has a right to set off a debt due from him, in an action by the principal for the price of the goods. The factor may be liable to his employer for holding himself out as the principal; but that is not to prejudice the purchaser, who *bonâ fide* dealt with him as the owner of the goods, and gave him credit in that capacity. The lien of the policy broker rests on the same foundation. The only question is, whether he knew or had reason to believe that the person by whom he was employed was only an agent; and the party who seeks to deprive him of his lien must make out the affirmative. The employer is to be taken to be the principal

till the contrary is proved." 4 Campb. 353.

When a broker employs a factor to insure, he will merely have a lien on the policy to the extent of the factor's balance against his principal. See *Mann v. Schiffner*, 2 East, 523, 529; *M'Combie v. Davies*, 7 East, 5.

It has been decided that dyers (*Savill v. Barchard*, 4 Esp. 53), calico-printers (*Weldon v. Gould*, 3 Esp. 268), and wharfingers (*Naylor v. Mangles*, 1 Esp. 109; *Spears v. Hartly*, 3 Esp. 81), have a lien for their general balance. But the general balance must arise from work done in the course of the same business, in respect of which the goods on which they claim a lien are in their hands. Thus it is laid down by Lord *Kenyon*, that calico-printers "could not claim a lien for money lent, or for any collateral matter: it should be confined to the work done in the particular business." *Weldon v. Gould*, 3 Esp. 268.

With regard however to dyers, the decisions do not appear to be uniform, for although in *Kirkman v. Shawcross*, 6 T. R. 14, dyers, dressers, whisters, and calenderers of Manchester and its neighbourhood, established a lien for their general balance, this decision appears to have been arrived at upon proof of a special advertisement to that effect, and notice of it to the contracting party, and may therefore be said to depend upon contract. In *Close v. Waterhouse*, 6 East, 523 n., and *Bennett v. Johnson*, 2 Chitty, 455, it was held that

a dyer had no general lien. See also *Green v. Farmer*, 4 Burr. 2214.

It has been determined that fullers, have no lien, on clothes deposited with them, for their general balance. *Rose v. Hart*, 8 Taunt. 499; 2 J. B. Moore, 547.

The usage of trade as to whether any of the persons we have last mentioned may or may not be entitled to a lien for their general balance, may vary in different localities, and with respect to wharfingers, it has been said "that the onus of making out a right of general lien lies upon the wharfinger. There may be an usage in one place varying from that which prevails in another. Where the usage is general, and prevails to such an extent that a party contracting with a wharfinger must be supposed consulant of it, then he will be bound by the terms of that usage; but then it should be generally known to prevail at that place. If there be any question as to the usage, the wharfinger should protect himself by imposing special terms, and he should give notice to his employer of the extent to which he claims a lien. If he neglects to do so, he cannot insist upon a right of a general lien for anything beyond the mere wharfage." Per *Bayley, J.*, in *Holderness v. Collinson*, 7 B. & C. 216.

An attorney has a lien for his general balance for business done as attorney on papers of his clients which come to his hands in the course of his professional employment as attorney (*Stevenson v. Blakelock*, 1 Mau. & Selw. 535);

but he will not have a general lien either for business done or on papers come to his hands in a different capacity, as, for instance, in the capacity of town-clerk (*The King v. Sankey*, 5 Ad & Ell. 423; *Worrall v. Johnson*, 2 J. & W. 214), or mortgagee (*Annesley's case*, 2 Drew. 409; *Pelly v. Wathen*, 7 Hare, 851). As to the lien of attorneys and solicitors, which scarcely comes within the plan of this work, see 2 Selwyn's *Nisi Prius*, 1864, 12th ed.; *Maugham's Law of Attorneys*, 308-323.

How the Right to a Lien may be lost.—It is essential to the validity of a lien, as we have before seen (see *ante*, p. 587), that there should be a possession of the thing in respect of which it is claimed; in other words, where there is no possession there can be no lien. Thus in *Hutton v. Bragg*, 7 Taunt. 14, where the owner of a vessel claimed a lien for the hire stipulated by the charter-party for the voyage, on goods shipped by the charterer who had become bankrupt, it was held by the Court of Common Pleas that the former was not entitled to a lien. "There is in this case," said *Dallas, J.*, "no possession in the defendant, and there can be no lien unless there is possession. It may be considered that the charterer of a ship is during the existence of the charter-party to all intents and purposes the owner of the ship; the bankrupt had put these goods on board in that character, and the defendant had no legal right

to resume the possession of the ship until the goods were unloaded, and therefore he had no right to detain the goods." See also *Kinloch v. Craig*, 3 T. R. 119, 788.

The principal case of *Kruger v. Wilcox* is a good illustration of the rule, that a lien will be lost by the abandonment of the possession of the goods in respect of which it is claimed. There a factor entitled to a lien on goods consigned to him by his principal, informed a broker employed by the principal, that the principal would sell the goods himself, and gave an order to the warehouseman to deliver the goods to the broker, who accordingly sold and made out the bills of parcels to the principal: it was held by Lord Chancellor *Hardwicke*, that this amounted to a delivery of the goods in specie to the principal, and that the lien was therefore gone. "Although," said his Lordship, a "factor may retain for the balance of an account, yet if the merchant comes over, and the factor delivers the goods up to him, by his parting with the possession he parts with the specific lien. Such is the law of the land as to retainers in other cases."

And after a person has voluntarily parted with goods on which he has a lien, it will not revive on his recovering possession of them (*Sweet v. Pym*, 1 East, 4); secus if they had been stolen or taken away by a trespasser or by fraud. *Wallace v. Woodgate*, R. & M. 194.

A lien will not be lost by the goods being put into the posses-

sion of a depositary or bailee for safe custody, as in the case of goods put into the possession of a warehouseman or wharfinger for those purposes. *Wilson v. Kymer*, 1 Mau. & Selw. 157.

A person may even lose a lien on goods, although he never parts with them. Thus, if a person having a lien on goods causes them to be taken in execution at his own suit, he will lose his lien thereby, although the goods are sold to him under the execution, and are never removed off the premises. *Jacobs v. Latour*, 5 Bing. 180.

When the debt, in respect of which the lien is claimed, is satisfied, the lien or right of retainer will necessarily be lost. Thus, if a person releases a debt, as, for instance, by executing a composition-deed, he will thereby put an end to any lien which he may claim in respect of the debt. *Cowper v. Green*, 7 M. & W. 633; *Buck v. Shippam*, 1 Ph. 694. So "if a security is taken for the debt for which the party has a lien upon the property of the debtor, such security being payable at a distant day, the lien is gone." Per *Tindal*, C. J., in *Hewison v. Guthrie*, 2 Bing. N. C. 759. Thus in *Cowell v. Simpson*, 16 Ves. 275, an executor confessed judgment to a firm of solicitors for the amount of their demand against his testator, and afterwards gave them two promissory notes payable with interest three years after date. The solicitors declined to deliver the papers to him without payment of the money secured by the judgment and the notes, though

the executor had not since the judgment possessed assets, and the notes had not become payable. Lord *Eldon*, C., held that the lien on the papers was superseded by the solicitors taking security. "The exigences of mankind," said his Lordship, "requiring goods to be delivered up for consumption, the implication from an engagement for security, of an engagement to deliver the goods without payment is necessary: otherwise from a promissory note payable in three years, a contract must be implied, that the goods are to be retained during that period; destroying the other special contract. So in this instance, if the solicitor says, he will not proceed in the business, and will not deliver up the papers, the consequence is, that he destroys the express contract to postpone payment for three years. Therefore, unless from the fact that he has taken this security, you can imply that he is to keep the papers three years, though the vital interests of the owner may depend on the possession of them, the implication is necessary, that he is to deliver them up, and rely on the other contract."

And it seems to be immaterial that the securities taken are already due. *Cowell v. Simpson*, 16 Ves. 282.

A person having a lien may also lose it by his misconduct. Thus "if a person having a lien, abuses it by pledging the goods, the owner's right to the possession revives, and he may maintain an action of trover." Per *Tindal*, C. J., in *Scott v. Newton*, 1 M. & Rob.

252; see also *Jones v. Cliffe*, 3 Tyrw. 576; 1 C. & M. 540. A set-off, however, cannot be considered as destroying a lien, unless it be so agreed upon between the parties. Thus in *Pinnock v. Harrison*, 3 M. & W. 532, where an action in trover was brought for certain carriage ironwork, the defendant set up as a defence a lien on the iron-work for work done to it, at the plaintiff's request. It was held in the Exchequer Chamber that, in the absence of a special agreement, the plaintiff could not claim a right of set-off against the lien. "Here," said *Alderson*, B., "are two parties having mutual claims on each other, with this difference, that the defendant claims the advantage of a security for it, which the plaintiffs have not; unless there is a specific agreement to that effect, it would be unreasonable that the defendant should lose the benefit of his lien." See also *Clarke v. Fell*, 4 B. & Ad. 408.

If, however, an arrangement has been entered into between the parties that work is to be done, on account of which the lien was to be claimed, should be paid for in a particular manner and out of a particular fund; and that being the only debt on which the lien was claimed, it might be an answer to it in that way; or if the debt having been created, the parties came to a new arrangement, and agree that the debt shall be satisfied in a particular way, then the lien is lost; for then it would be in truth a debt paid." Per *Alderson*, B., in *Pinnock v. Harrison*, 3 M. & W. 539.

Upon a sale of the goods to a third party he will take them subject to the lien. Thus "where goods are put on board a general ship under a bill of lading, and the owner of the ship has, by the charter-party reserved to himself a lien upon the goods laden on board the ship for his freight due under the charter-party, he has such lien to the extent of the freight due for these particular goods under the bill of lading, whether the goods remain the property of the same person during the voyage or are sold, before delivery, to a stranger; or in other words, the extent of the ship-owner's lien remains unaltered, whether the bill of lading is indorsed to a third person for a valuable consideration or the goods are deliverable to the original consignee." Per *Tindal*, C. J., in *Small v. Moats*, 9 Bing. 592.

"Upon the same principle it would seem to follow, that if the lading of the ship belongs to the charterer, and such lading is subject to the ship-owner's lien for the freight reserved by the charter-party, such lading if it be sold by the charterer after it is put on board, would pass to the purchaser, subject to the lien which the ship-owner had before the sale." *Ib.*; see also *Dixon v. Yates*, 5 B. & Ad. 313. It is not necessary, in order to entitle a plaintiff in an action of trover to recover, that he should prove an actual tender of the money, if it appears he was ready to pay it, but that the defendant refused to deliver the

goods, except on payment of an alleged old balance, which the jury find not to have been really due. *Jones v. Tarleton*, 9 M. & W. 675.

If one having a lien upon goods, when they are demanded of him claims to retain them upon a different ground, making no mention of the lien, he will be held to have waived it, and trover may be maintained against him, without evidence of any tender having been made of the amount in respect of which the lien is claimed (*Boardman v. Sill*, 1 Camp. 410 n.; *Dirks v. Richards*, 4 M. & Gr. 574); but it seems that the right to detain a chattel on account of a specific lien will not be lost by a claim to retain it for a general balance. *Scarfe v. Morgan*, 4 M. & W. 270; see also *Sanderson v. Bell*, 2 C. & M. 304; 4 Tyr. 244.

A person retaining goods in his possession does not lose his right to a lien upon them by lapse of time, inasmuch as the Statute of Limitations only bars the remedy at law, and not the debt. *Higgins v. Scott*, 2 B. & Ad. 413; *Spears v. Hartly*, 3 Esp. 81; *Re Broomhead*, 16 L. J. Q. B. 355.

As to the lien of vendors of realty for unpaid purchase-money, see *Mackreth v. Symmons*, 1 L. Cas. Eq. 235, 2nd edit.

As to the lien of vendors of chattels for unpaid purchase money, see *Blackburne*, Contract of Sale, 308, 344, and *ante*, p. 516.

As to the lien of a person who has advanced money upon a deposit of title deeds, see *Russel v. Russel*, 1 L. Cas. Eq. 541, 2nd edit.

THE CASE OF MARKET OVERT.

Hil. 38 Eliz.

[REPORTED 5 CO. 83 B. ; S. C. 1 ANDERS. 344 ; MOORE, 360.]

SALE IN MARKET OVERT.—*If plate be stolen and sold openly in a scrivener's shop in the city of London on market-day, this shall not alter the property ; otherwise, if it had been in a goldsmith's shop. Every day, except Sunday, is a market-day in London.*

If a sale be not in the shop, but in the warehouse or other place in the house, the property is not changed.

Every shop in London is a market overt for such things only which by the trade of the owner are put there for sale.

At the sessions of Newgate now last past, it was resolved by Popham, Chief Justice of England, Anderson, Chief Justice of the Common Pleas, Sir Thomas Egerton, Master of the Rolls, the Attorney-General, and the Court, that if plate be stolen and sold openly in a scrivener's shop on the market-day (as every day is a market-day in London except Sunday), this sale should not change the property, but the party should have restitution ; for a scrivener's shop is not a market overt for plate, for none would search there for such a thing ; *et sic de similibus*, etc. But if the sale had been openly in a goldsmith's shop in London, so that any one that stood or passed by the shop might see it, there it would change the property. But if the sale be in the shop of a goldsmith, either behind a hanging, or behind a cupboard upon which his plate stands, so that one that stood or passed by the shop could not see it, it would not change the property. So if the sale be not in the shop, but in the warehouse or other place of the house, it would not change the property, for that is not in market overt, and none would search there for his goods. So every shop in London is a market

overt for such things only which by the trade of the owner are put there to sale; and when I was Recorder of London, I certified the custom of London accordingly. Note, reader, the reason of this case extends to all markets overt in England.

[*Nota.* If goods are sold in a market overt, although no toll is paid, yet the sale is good. But if horses, mares, or geldings, be sold in a market overt, without paying toll there the sale is void, and does not alter the property by the stat. 2 Ph. & Mar. c. 7, and 31 Eliz. c. 12. See 2 Black. Com. ch. 30, fol. 449, 450, 451.]

As a general rule at common law, subject to the important exceptions we shall hereafter mention, a person who is not the true owner of chattels, and who has no power express or implied from the true owner for that purpose, cannot confer any property in such chattels upon another. If, for instance, a person having feloniously obtained chattels, sells them, although to a *bond fide* purchaser, the owner may maintain trover for them against the purchaser. And this the owner may do even although he has not prosecuted the felon to conviction. See *Stone v. Marsh*, 6 B. & C. 551; 9 D. & R. 643; R. & M. 364; *Marsh v. Keating*, 1 Bing. N. C. 198; 1 Scott, 5; and *White v. Spettigue*, 13 M. & W. 603; and *Lee v. Bayes*, 18 C. B. 599, overruling on this point *Gimson v. Woodfull*, 2 C. & P. 41; *Peerv. Humphrey*, 2 Ad. & Ell. 495; 4 N. & M. 430. It being now clear "that the obligation which the law imposes on a plaintiff to prosecute the party who has stolen his goods does not apply where the action is against a third

party innocent of the felony." 18 C. B. 602. So if goods be let out on hire, although the person who hires them has the possession of them for the special purposes for which they are lent, yet if he sell them the owner may maintain trover for them against the purchaser. See *Loeschman v. Machin*, 2 Stark. N. P. 311; *Cooper v. Wilomatt*, 1 C. B. 672.

We purpose now to consider briefly the exceptions to the general rule, viz. first in the case of sales in market overt; secondly, in the case of *bond fide* purchases out of market overt from fraudulent vendees; thirdly, in the case of the transfer of negotiable instruments; lastly, we propose to notice the cases in which a power of sale over the chattels of another is expressly conferred or implied by law.

1. *Sales in Market overt.*—Where a person has found or stolen the goods of another, and sells them in a market overt to a *bond fide* purchaser, the property therein

will pass to him, nor can the owner (save in the cases hereafter mentioned) recover back his property. The policy upon which this exception to the common law was established has been stated to have been for "the encouragement to trade and to render contracts in fairs and markets secure, so that however injurious or illegal the title of the vendor may be, yet the vendee's is good against all men." Bac. Ab. Tit. Fairs and Markets, E. 1.

In the city of London, as is laid down in the principal case, every day, except Sunday, is a market-day (*ante*, p. 602), and every shop there is a market overt, but for such things only which by the trade of the owner are put there for sale. *Ib.* Thus in the principal case it was held that a scrivener's shop was not a market overt for plate, though a goldsmith's shop similarly situated would clearly have been so. See also S. C. nom. *The Bishop of Worcester's case*, Moore, 360; 1 Anders. 344.

Upon the same principle it was laid down in the same case that Smithfield is a market overt for horses and cattle, and not for clothes (Moore, 360); and also that as Cheapside is not a place where horses are usually sold, a sale of horses in that place will not change the property in them as against the owner. *Ib.*; and see *Clifton v. Chancellor*, Moo. 624; *Taylor v. Chambers*, Cro. Jac. 68.

A market overt in the country

is held by charter or prescription, in certain places and during certain times, and a sale of chattels belonging to another in order to be valid must take place during those times and at those places. Thus in *Peer v. Humphrey*, 4 Nev. & Man. 430; 2 Ad. & Ell. 495, upon an action of trover for three oxen, it appeared that the plaintiff had directed his servant to drive the oxen to Northampton Market, but, instead of doing so, he sold them to the defendant *on the high road*, and not in market overt, and absconded with the money. The plaintiff gave notice of the felony to the defendant, who afterwards sold the oxen in market overt, after which the plaintiff prosecuted the felon to conviction. It was held by the Court of Queen's Bench that the plaintiff might recover from the defendant the value of the property in trover. "Here," said *Williams, J.*, "there was no legal sale at all; the property therefore was still in the plaintiff." See also *Taylor v. Chambers*, Cro. Jac. 69; *Mosley v. Walker*, 9 D. & R. 863; 7 B. & C. 54; *Mayor of Macclesfield v. Chapman*, 12 M. & W. 18.

A shop in a country town, it seems, is not, as is the case in the City of London, a market overt, even for things usually sold there. See *The Prior of Dunstable's case*, 11 Hen. VI. 19 pl. 2; *Harris v. Shaw*, Ca. t. Hardw. 349; *Anon.* 12 Mod. 521; and see *Lee v. Bayes*, 18 C. B. 599, where it was held that a sale by public auction

at a horse repository, out of the city of London, was not a sale in market overt. A wharf is not a market overt, even for things usually sold there. Thus in *Wilkinson v. King*, 2 Campb. 335, the owner of some lead sent it to a wharf in the borough of Southwark, where lead was usually sold. The wharfinger, without any authority, sold it to a *bonâ fide* purchaser, who duly paid for it. In an action of trover for the lead by the owner, he obtained a verdict in his favour, and Lord *Ellenborough* held that the sale did not change the property in the lead, observing that the doctrine contended for would give wharfingers the dominion over all the goods entrusted to them; but that a wharf could not be considered even in London as a market overt for the articles brought there. The wharfinger had no colour of authority to sell the lead, and no one could derive a good title to it under such a tortious conversion."

Even when a sale is made in a shop in market overt, it must be made *openly* in order to change the property. If, for instance, as is laid down in the principal case, plate be stolen and sold in the shop of a goldsmith, either behind a cupboard upon which the plate stands, so that one that stood or passed by the shop could not see it, such sale would not change the property; so if the sale was not in the shop, but in the warehouse or other place, it would not change the property, and the reason given is, that "that is not in market

overt, and none would search there for his goods."

A shop however in the city of London, although it is not sufficiently open to the street for a person on the outside to see what passes within, is a market overt, and a sale there of goods in which a shopkeeper usually deals will be valid. Thus in *Lyons v. De Pass*, 11 Ad. & Ell. 326, which was an action of trover for 1,000 pairs of slippers sold by the person who had stolen them from the plaintiff to the defendant. The place of sale was mentioned by a witness at Nisi Prius as an "open shop," which on cross-examination he described as an "open warehouse," with slippers in the window; it was held on a motion to enter a verdict for the plaintiff, that it was a market overt within the custom of London, and the sale was consequently good. "In the case of the *Market Overt* (5 Co. 83 b)," said *Littledale, J.*, "the sale which was held not to pass property was a sale of plate in a scrivener's shop, which is not a market for goods of that kind. But if no such objection arises, it cannot be made a difficulty that there is now glass in the windows of shops, whereas in former time they were entirely open. Many shops now are more open in their construction than others; but no difference can be made on that account."

A sale even in market overt will not be binding in certain cases, as, for instance, if the goods there sold were the king's (2 Inst. 713); or if the buyer knew whose goods they were (ib.); or if the sale

were fraudulent on the part of the vendor and vendee (*ib.*); or without valuable consideration (*ib.*); or if the sale were made by an infant of such tender years that it must be apparent that he was under age; or by a feme covert, if the vendee knows her to be so, it will not pass the property in the goods sold, unless in the case of the feme covert the things sold were such as she usually deals in, or were sold by the consent of her husband. *Ib.*

Nor will a sale be valid if made in the night, nor unless made between sunrising and sunset (*ib.*); nor unless the contract were originally and wholly made in the market overt; and it will not be sufficient merely to have had its inception out of and its consummation in the market. *Ib.*

Again, a man will not be bound by a sale to him of his own goods in market overt. *Ib.* And if a sale be made of goods by a stranger in a market overt, whereby the right of the owner is bound, yet if the seller acquires the goods again, the owner may take them, because the seller was the wrongdoer, and he shall not profit by his own wrong. *Ib.*

A mere pawn in market overt will not bind the true owner. *Hartop v. Hoare*, 2 Stra. 1187; 1 Wills. 8; 3 Atk. 44; *Packer v. Gillies*, 2 Campb. 336.

A sale in market overt will not only bind those who are *sui juris*, but also "infants, feme coverts, idiots, or lunatics, men beyond sea or in prison, and whether they

were possessed of them in their own right or as executors or administrators." *Ib.*; and see Bac. Ab. Tit. Fairs and Markets (E.) I.

In order to encourage the prosecution of offenders, it has been enacted by 7 & 8 Geo. IV. c. 29, s. 57 (re-enacting in effect, 21 Hen. VIII. c. 11, "That if any person guilty of any such felony or misdemeanour as is thereinbefore mentioned, in stealing, taking, obtaining, or converting, or in knowingly receiving any chattel, money, valuable security, or other property whatsoever, shall be indicted for any such offence, by or on behalf of the owner of the property, or his executor or administrator, and convicted thereof, in *such case the property shall be restored to the owner or his representative*; and the Court before whom any such person shall be so convicted shall have power to award from time to time writs of restitution for the said property, or to order the restitution thereof in a summary manner." The act then provides, "that if it shall appear *before* any award or order made that any valuable security shall have been *bond fide* paid or discharged by some person or body corporate, liable to the payment thereof, or being a negotiable instrument shall have been *bond fide* taken or received by transfer or delivery, by some person or body corporate, for a just and valuable consideration, without any notice, or without any reasonable cause to suspect that the same had by any felony or misdemeanour been stolen, taken,

obtained, or converted as aforesaid, in such case the Court shall not award or order the restitution of such security."

It has been held under this statute that the property in a stolen chattel, although sold in market overt, reverts in the owner on the conviction of the felon, and that he may maintain trover for it, though there has been no order for restitution. See *Scattergood v. Sylvester*, 15 Q. B. 506. There one Daykin having stolen a cow sold it in market overt to the defendant, who purchased and paid for it *bonâ fide* and without any notice or knowledge that it had been stolen or was not the property of Daykin. Daykin was convicted for the theft and transported. It was held by the Court of Queen's Bench, that the plaintiff was entitled to maintain trover for the cow. "In this case," said Lord Campbell, C.J., "it is admitted that sale in market overt would be no answer to the action if an order of restitution had been made. We are now to determine what is the consequence of the want of such an order. The plaintiff must rely on the statute, for at common law the property was changed permanently by sale in market overt. On reference to the statutes 21 Hen. VIII. c. 11, and 7 & 8 Geo. IV. c. 29, we are satisfied that the property is re-vested on conviction. By the statute 21 Hen. VIII. c. 11, the owner was restored to his goods. How could that be unless he had a right to recover them? By the

subsequent statute the property 'shall be restored.' How is this provision to be executed effectually, unless the right is restored? It may be matter of regret, certainly, when an order of restitution is not made so as to obviate the necessity of an action. But the order is not a condition precedent to the re-vesting of the property. The dictum of Buller, J., in *Horwood v. Smith* (2 T. R. 750), that the plaintiff's property re-vested after conviction, accords with this view and is quite in point."

The owner however of stolen goods, although he prosecute the felon to conviction, cannot recover the value of them in trover from the person who purchased them in market overt, if he sell them again *before* the conviction take place, notwithstanding the owner may give him notice of the robbery while they are in his possession. See *Horwood v. Smith*, 2 T. R. 750, which was a case where sheep had been stolen, and sold by the thief in market overt to a person to whom the owner gave notice of the theft, but who resold the sheep before the conviction of the offender; and it was held by the Court of Queen's Bench, that although the owner had a right to a restitution of the sheep, he could not maintain an action against the first purchaser, who was not in possession of them at the time of the attainder. "The plaintiff," said Buller, J., "could not demand the goods of the defendant, merely because they had been stolen from

him; for it was not then certain that the felony would be followed by a conviction of the offender. This is an action of trover for sheep; and in order to maintain it, the plaintiff must prove that the sheep were his property, and that while they were so they came into the defendant's possession, who converted them to his use. Now when did the plaintiff's property begin in this case? Not till after the conviction of the felon; because before that time the property had been altered by a sale in market overt. From the time of the conviction, the defendant never had the possession of the sheep, then it cannot be said that he converted the plaintiff's sheep to his use, having parted with them before the time when the property was re-vested in the plaintiff." And *Grose*, J. said, "If this action could be maintained, it would defeat the object of the Act of Parliament, which entitles the owner of stolen goods, prosecuting to conviction, to a restitution of them. For if third persons in whose possession goods which had been stolen came fairly and for a valuable consideration, were compelled to deliver them up before a conviction of the felon, it would take away the incitement to the prosecutor to convict the felon, which it was the intention of the Legislature to give."

Where, however, property feloniously taken from the plaintiff was sold by the felon to the defendant, who purchased *bonâ fide*, but not in market overt, and the plaintiff gave notice of the felony

to the defendant, who afterward, but *before* the conviction of the felon, sold the property in market overt, it was held that the plaintiff might recover from the defendant. *Peer v. Humphrey*, 2 Ad. & Ell. 495.

The statutes 2 & 3 Ph. & M. c. 7, and 31 Eliz. c. 12, provide for the sale of horses in markets and fairs, and impose "sundry good ordinances touching the manner of selling and tolling horses for the purpose of repressing or avoiding horse stealing." They prevent the property in any stolen horse from being altered by sale in market overt until six months have elapsed from the time of the sale, and enable the owner at any time afterwards to recover the horse on payment of the price given by the purchaser. The names and addresses of all the parties to contracts for the sale of horses are to be entered in the toll-gatherer's book, together with the price of the horse, its colour, marks, etc., and if the requisites of the Acts as regards these and other particulars are not complied with, the sale is void. Addison, Contracts, 218, 4th ed.

The question sometimes arises how far judgment-debtors, and parties against whom execution has issued, can dispose of their goods. It seems that since the Statute of Frauds (29 Car. II. c. 3, s. 16), the right which was given to the sheriff by the writ to seize property, no longer speaks from the *teste* of the writ, but from the time of its delivery upon the receipt of which the sheriff is to levy. Now after

the writ of execution has been delivered to the sheriff, the judgment-debtor may transfer his goods, but the sheriff has a right to the execution notwithstanding the transfer, subject therefore to the execution; the debtor however can pass the property in his goods by a *bonâ fide* transfer (*Samuel v. Duke*, 3 M. & W. 629, 630), but if he transfers his goods in market overt, the right of the sheriff ceases altogether. *Ib.* In *Bowen v. Bramege*, 6 C. & P. 140, A., expecting an execution, executed a deed, assigning all his property to trustees for the benefit of all his creditors, after paying expenses, with a power to the trustees to retain money to pay the costs of an action which had been brought by J. S. against A. This deed was executed at nine A.M., on the 25th of February. A writ of *fi. fa.* was delivered to a sheriff's officer on the 24th, and by him delivered to the undersheriff at ten A.M., on the 25th. It was held that the deed was good, notwithstanding the proviso to retain, and that the goods could not be taken under the *fi. fa.*

A delivery to the sheriff's deputy in London, amounts to a delivery to the sheriff. *Woodland v. Fuller*, 11 Ad. & Ell. 867; and see *Lowthal v. Tonkins*, Barn. 42.

2. *Bonâ fide Purchasers out of Market overt from fraudulent Vendees.*—Where a person enters into a fraudulent contract for the purchase of goods, as, for instance, where he never intends to pay for them, the vendor may, before the

goods have left the hands of the purchaser or his assignees in bankruptcy, elect to consider the sale void, and it will be so treated *Load v. Green*, 15 M. & W. 216; *Noble v. Adams*, 7 Taunt. 59; *Abbotts v. Barry*, 5 J. B. Moo. 98.

A carrier delivering goods to a person who has fraudulently purchased them without any intention of paying the price, may be liable to the owner in trover for a wrongful delivery of the goods where they are left at a different place from that to which they were directed by the consignors. See *Stephenson v. Hart*, 4 Bing. 476: there the plaintiff having been imposed upon by a swindler, consigned a box at Birmingham by the defendants, as common carriers, to J. West, 27, Great Winchester Street, London. The defendants found that no such person resided there, but upon receiving a letter, signed "J. West," requesting that the box might be forwarded to a public-house at St. Alban's, they delivered it there to a person calling himself West, who showed that he had a knowledge of the contents of the box. That person having disappeared, and the box having been originally obtained by the plaintiff by fraud, it was held by the Court of Common Pleas, dissentiente Gaselee, J., that the defendants were liable to him in an action of trover. "At the outset," said Burrough, J., "no doubt the contract was between the carrier and the consignee; but when it was discovered that no such person as the consignee was to be

found in Great Winchester Street, that contract was at an end, and the goods remaining in the hands of the carriers as the goods of the consignor, a new implied contract arose between the carrier and the consignor, to take care of the goods for the use of the consignor. *It is clear the property in them never passed out of the plaintiff, the consignor."*

The mere consciousness of a person, at the time when he purchased goods, that he will be unable to pay for them, will not amount to a case of fraud that will vitiate the contract. See dictum of *Tindal*, C. J., in *Irving v. Motly*, 7 Bing. 551.

So trover will lie against a person to whom the plaintiff has made a fictitious sale of his goods, in order to defraud his creditors, by means of an invoice and a false receipt for the purchase-money. *Bowes v. Foster*, 2 H. & N. 779.

Where, however, goods have been obtained from a person by means of a fraudulent purchase, he cannot, as against a *bonâ fide* purchaser to whom they have subsequently been sold, declare his election to consider the original sale void. See *White v. Garden*, 10 C. B. 919: there Parker bought of the defendants seventy tons of iron, paying for it partly in cash, and giving bills for the residue. Parker afterwards sold the iron to the plaintiff, to whom it was by Parker's order delivered by the defendants. Subsequently the defendants, having discovered that the proposed acceptor of the bills

was a fictitious person, and that they had been defrauded, sent and took away from the plaintiff's wharf a barge containing twenty-nine tons of the iron, which was left with the delivery order, alongside the plaintiff's wharf to be unloaded. The defendants also gave the plaintiff notice of the fraud, and desired him not to part with any of the iron in his possession. The purchases were *bonâ fide* on the part of the plaintiff, and had been made at the fair market price, and through the intervention of a broker. It appeared that Parker had given the defendants a false address: but it did not appear that the defendants had made any inquiry either about him or the acceptor of the bills, until after the iron had been sent by them to the plaintiff's wharf. Trover being brought by the plaintiff for the twenty-nine tons of iron, it was insisted on the part of the defendants, that, the transaction being a fraud on the part of Parker, no property in the iron passed to him, and consequently none could be acquired by his vendee, though no party to the fraud. For the plaintiff it was submitted, that the right in the original vendors to rescind the sale, was at an end when the goods had come to the hands of a *bonâ fide* purchaser for value. The plaintiff obtained a verdict for the value of the iron removed from his wharf, leave being reserved to the defendants to move to enter a verdict for them, if the Court should be of opinion that no property in the iron passed by the

sale from Parker to the plaintiff. In discharging a rule *nisi* it was unanimously held by the judges of the Court of Common Pleas, that the property in the iron passed from Parker to the plaintiff. "The question," said *Cresswell*, J., "is whether the plaintiff, who it is admitted acted *bonâ fide*, by this purchase obtained a property in the iron. It seems to me that the case of *Parker v. Patrick* (5 T. R. 175), as explained in *Load v. Green*, (15 M. & W. 219), well warrants us in discharging this rule. *Parke*, B., there says that that case may be supported on the ground that the transaction is not absolutely void, except at the option of the seller; that he may elect to treat it as a contract, and he must do the contrary before the buyer has acted as if it were such, and resold the goods to a third party; and that *Wright v. Lawes* (4 Esp. 82) is an authority to the same effect. I think it is. And I see no difficulty or hardship in so deciding. One of two innocent parties must suffer: and surely it is more just that the burthen should fall on the defendants, who were guilty of negligence in parting with their goods upon the faith of a piece of paper which a little inquiry would have shown to be worthless, rather than upon the plaintiff, who trusted to the possession of the goods themselves." See also *Sheppard v. Shoolbred*, 1 Carr. & M. 61, and the remark of *Jervis*, C.J., thereon in *White v. Garden*, 10 C. B. 928; *Powell v. Hoyland*, 6 Exch. 67.

And the result is the same if, before the vendor interferes, the vendee pledges the goods for a *bonâ fide* advance. See *Kingsford v. Merry*, 11 Exch. 577.

But a *bonâ fide* vendee or pawnee will not be able to retain goods unless he has purchased them from a person between whom and the original owner the relation of vendor and purchaser existed, and a contract existed between them which the original owner might either affirm or disaffirm. It was upon this principle that *Kingsford v. Merry* was decided in the Exchequer Chamber, 1 H. & N. 508, and although the decision of the Court of Exchequer (11 Exch. 577) was there reversed, it was not upon the question of law, but upon a different assumption of the facts of the case, the Court of Exchequer assuming that a contract of sale existed between the original owner and the fraudulent pledgor (which, had it been really the case, would have justified the decision they arrived at), the facts before the Court of Exchequer appearing to be, that no such contract really existed. The facts of the case of *Kingsford v. Merry*, as they appeared in the Court of Exchequer Chamber, were as follows:—In April, 1853, Jones and Co., brokers, sold for the plaintiffs, manufacturing chemists, two tons of tartaric acid, to be delivered in November. In October, 1853, Gray and Co., brokers, sold for the plaintiffs two tons of tartaric acid to be delivered in November. Jones and Co. and Gray and Co. respec-

tively, sent to the plaintiffs sold notes, not disclosing any principal. In November, a clerk of one Anderson, a merchant, left at the plaintiff's counting-house two delivery orders. One was from Jones and Co. for delivery to T. Broomhall or order of one of the tons of acid: this order was indorsed by T. Broomhall. "Deliver to my order." The other delivery order was from Gray and Co. for delivery to T. Broomhall or order of two tons of acid: this order was indorsed, "T. Broomhall—Deliver to W. Leask. J. Ellis—Deliver at Custom House Quay to my sub-order. W. Leask." Anderson induced Leask to purchase from Ellis the acid for him, upon a *false representation that he was acting on behalf of Van Notten and Co.* Ellis thereupon gave to Leask the delivery-orders which he had received from Broomhall. Leask indorsed the orders specially deliverable to himself, and delivered them to Anderson for the purpose of enabling him to inspect the acid. On the 28th of November, Anderson went to the plaintiffs and stated that he had purchased from Leask the acid mentioned in the delivery orders, and he requested the plaintiffs to deliver it at the Custom House Quay for him. On the faith of this statement, the plaintiffs gave Anderson a delivery order, and the acid was transferred into his name. Anderson then obtained warrants, and pledged the acid with the defendant for a *bond fide* advance. It was held by the Court

of Exchequer Chamber, reversing the decision of the Court of Exchequer, that under these circumstances, the relation of vendor and purchaser did not subsist between the plaintiffs and Anderson, neither did the property in the acid pass to Anderson, and that mere possession with no further *indicia* of title than the delivery orders was not sufficient to entitle the defendant, though a *bond fide* pawnee, to resist the claim of the plaintiffs in an action of trover.

The decision in the case of *Kingsford v. Merry* occasioned great dissatisfaction in the city, where the grounds of the decision in the Exchequer Chamber were misunderstood. It appears also to have been thought, that delivery orders were negotiable instruments, so that the property ought to have passed with them. It seems, however, to have been forgotten, that so late as the year 1817, a jury of the city of London, said by Lord *Ellenborough*, C.J., to have been "a most intelligent jury," expressly found that a person having mere possession of "a delivery order, was not thereby armed with such *indicia* of property as to be enabled to deal with it as his own." See *Boyson v. Coles*, 6 Mau. & Selw. 14. The subsequent case of *Higgins v. Burton* (26 L. J. Exch. 342) proceeds on the same principle as *Kingsford v. Merry*: there the plaintiffs, who were partners as silk-merchants, had in 1855 dealings with one Fitzgibbon, a merchant at Cork, in whose employ, until July in that year, was one Dix,

who had become known to the plaintiffs as Fitzgibbon's agent. On the 26th of July Dix, after he had been discharged by Fitzgibbon, proposed to purchase of the plaintiffs, in Fitzgibbon's name, certain silks, which were delivered to him, and by him sent to the defendant, an auctioneer, by whom they were sold, and the proceeds paid to Dix. In September Dix obtained other goods of the plaintiffs in a similar way, and sent them to the defendant for sale. The *defendant made an advance of £60* upon this parcel of goods, and *afterwards*, but not before, had notice from the plaintiffs that all the silks had been fraudulently obtained from them. It was held by the Court of Exchequer that as there was no contract with Dix, and as he had obtained the goods by fraud, the plaintiffs were entitled to recover the full amount of the proceeds of the silks. "Dix," said *Watson, B.*, "only affected to have the authority of Fitzgibbon to purchase the goods; he had, in fact, no such authority, and no property passed to him. There was no real contract, and he could give no better title than he had; and the pledge to the defendant passed no property."

3. *Transfer of Negotiable Instruments by Persons not entitled to them.*—Besides the cases already considered, another important exception to the general rule exists in the case of negotiable instruments, for the property in them will pass like cash, by mere de-

livery to a person taking them *bond fide* and for value, who will be entitled to retain them as against the former owner, who may either have lost them, or from whom they may have been stolen. Nor is it essential to the validity of the transfer that it should be made in market overt. The leading case upon this subject is *Miller v. Race*, 1 Burr. 452; 1 Smith's Leading Cases, 389: there a bank-note payable as usual to bearer, sent by post under cover, had been taken out of the mail by a robber, and afterwards came into the hands of the plaintiff for full and valuable consideration in the usual course and way of business, and without any notice or knowledge of the bank-note having been taken out of the mail. It was held by the Court of King's Bench, that the plaintiff had a sufficient property in the bank-note to entitle him to recover in an action against the bank. Lord *Mansfield*, in giving judgment, said "that the case had been very ingeniously argued for the defendant. But the whole fallacy of the argument turned upon comparing bank-notes to what they did not resemble, and what they ought not to be compared to, viz. to goods or to securities, or documents for debts. Now they were not goods, nor securities, nor documents for debts, nor were so esteemed; but were treated as money, as cash in the ordinary course and transaction of business, by the general consent of mankind; which gave them the credit and currency of money, to all intents

and purposes. That they were as much money as guineas themselves were, or any other current coin that was used in common payment as money or cash. . . And it was necessary for the purposes of commerce, that their currency should be established and secured."

Solikewise it has long been settled that drafts on bankers, bills of exchange, or promissory notes, either payable to order and indorsed in blank, or payable to bearer, when taken *bond fide*, and for a valuable consideration, pass by delivery, and vest a right thereto in the transferee, without regard to the title or want of title in the person transferring them. Per *Holroyd*, J., 4 B. & Ald. 9; see also *Grant* v. *Vaughan*, 3 Burr. 1516; *Peacock* v. *Rhodes*, Doug. 636; *Coltins* v. *Martin*, 1 B. & P. 648.

The same principles have been held applicable to exchequer bills. Thus in *Wookey* v. *Pole*, 4 B. & Ald. 1, an exchequer bill, the blank in which had not been filled up, was placed by the proprietor in the hands of stockbrokers for the purpose of being sold. The stockbrokers, however, instead of selling it, deposited it at their bankers, who made advances to them upon its security to the amount of its value. The stockbrokers afterwards became bankrupt. It was held by the Court of King's Bench, consisting of *Best*, J., *Holroyd*, J., and *Abbot*, C.J., (*Bayley*, J., dissentiente), that the owner of the exchequer bill could not maintain trover against the bankers, inasmuch as the property in such ex-

chequer bill, like bank-notes and bills of exchange, passed by delivery. *Holroyd*, J., in his judgment, after alluding to the decisions of *Miller* v. *Race*, (1 Burr. 452) and *Peacock* v. *Rhodes*, (Doug. 636), relative to bank-notes and bills of exchange, observes, "Those cases have proceeded on the nature and effect of the instruments, which have been considered as distinguishable from goods. In the case of goods, the property, except in market overt, can only be transferred by the owner, or some person having either an express or implied authority from him; and no one can, by his contract or delivery, transfer more than his own right, or the right of him under whose authority he acts. But the courts have considered these instruments, either promises or orders for the payment of money, or instruments entitling the holder to a sum of money, as being appendages to the money, and following the nature of their principal. . . . These decisions proceed upon the nature of the property, viz. money, to which such instruments give the right, and which is itself current; and the effect of the instruments, which either give to their holders, merely as such, the right to receive the money, or specify them as the persons entitled to receive it. The question then is, whether these principles apply to the present case, or whether this exchequer bill and the right thereto, follow the nature of goods, which, except in market overt, can only be transferred by the owner, or under his

authority? In order to ascertain that, we must consider the nature and effect of the instrument, both as to the property which it concerns, and as to its negotiability or currency by law. In its original state, it purports to entitle the holder to the sum of £1,000 and interest; and the original holder may, if he pleases, secure it to himself; but it is payable to the bearer, until some name is inserted, and when that is done, it becomes payable to such nominee or his order. But if the original holder parts with it or keeps it in blank; he by that very act, or by his negligence if he loses it, authorizes the bearer, whoever he may be, to receive the money; and so, if he were to insert his own name, but indorse it in blank, instead of restraining its negotiability, either by not indorsing it at all, or by making a special indorsement, he thereby authorizes and empowers any person who may be the holder *bond fide* and for value to receive it; and he cannot revoke that authority, when it has become coupled with an interest. . . . An exchequer bill is an instrument for the repayment of money originally advanced to the public, purporting thereby to entitle the bearer to receive the money, put into circulation and made current by law. It is not, therefore, like goods saleable only in market overt, and not otherwise transferable, except by the owner or under his authority, but is, in all those several respects, similar to bills of exchange and promissory notes, and trans-

ferable in the same manner as they are."

And it is immaterial whether the person who delivered the negotiable instruments to a *bond fide* holder, either sold them, or merely pawned them; in either case he would pass the property to the holder, which in the first case would be absolute; in the latter qualified, viz. conferring a right to detain them until the sum raised upon them was paid. *Wookey v. Pole*, 4 B. & Ald. 9; *Collins v. Martin*, 1 Bos. & T. 648; 2 Esp. 520; *Barber v. Richards*, 20 L. J. Exch. 135.

So it has been laid down as clearly law, that if one deposit with his banker negotiable bills, and that banker afterwards deposit them with a third person, as a pledge for his own debt, the property in such bills will pass to the pledgee. Per *Dallas, J.*, in *Treuttel v. Barandon*, 8 Taunt. 103. As to the onus of proving notice of the title of a third party to a negotiable instrument transferred for value, see *Middleton v. Barned*, 4 Exch. 241.

Where, however, an instrument does not pass by delivery, but upon a transfer of a right merely to sue upon it in the name of the transferor or original party is given to the transferee, such instrument is not properly termed a negotiable instrument, and a person taking it, although *bond fide*, and for valuable consideration, will take it subject to the defects in the title of the transferor. Thus before Indian bonds were rendered

negotiable by 51 Geo. III. c. 64, s. 4, a transferee could obtain no better title to them than the person who transferred them to him had. *Glyn v. Baker*, 13 East, 509. See also *Williamson v. Thompson*, 16 Ves. 443.

An instrument which is ordinarily negotiable may cease to be so by a special indorsement, of a restrictive character. Indorsements such as the following have been held to be restrictive:—"Pay to A. B. or order per account of C. D." "Pay to A. B. or order for my use." "Pay to A. B. only." "The within must be credited to A. B." See *Edie v. East India Company*, 2 Burr. 1227; *Evans v. Cramlington*, Carthew, 5; *Cramlington v. Evans*, 2 Vent. 307; *Ancher v. Bank of England*, Doug. 615. In *Treuttel v. Barandon*, 8 Taunt. 100, 1 J. B. Moore, 543, a bill was thus indorsed by the payee, "Pay to J. P. De Roure, Esq., or order for account of Messrs. Treuttel and Wurtz." De Roure indorsed the bill to the defendants with whom he deposited it *as a security for his own account*. It was held by the Court of Common Pleas, that as the defendants took the deposit of the bill with sufficient notice on its face that it did not belong to De Roure, the Messrs. Treuttel and Wurtz were entitled to recover the value of the bill in an action of trover. In the important case of *Sigourney v. Lloyd*, 8 B. & C. 622, a bill drawn in America on a house in London payable to order, was indorsed by the payee generally to

A. Attwood, who indorsed it to the plaintiff, by whom it was indorsed thus, "Pay to Js. Williams, Esq., or his order for my use." Williams indorsed the bill to the defendants, his bankers, who discounted it for him, without making any inquiry, and applied the amount of the bill, less the discount, to the use of Williams, who soon afterwards became bankrupt. When the bill arrived at maturity the amount was received by the defendants. It was held by the Court of King's Bench in an action for money had and received, that the bankers were liable to refund the money to the plaintiff. Lord *Tenterden*, C. J., in his elaborate judgment, fully examines the authorities, and most satisfactorily states the principles upon which they proceed. "It appears," said his Lordship, "from the report of the case of *Snee v. Prescott* (1 Atk. 247) that in 1743 an indorsement in this form was not unusual; and it appears to have been the opinion of Lord *Hardwicke* in that case, and also to have been the opinion of Mr. Justice *Wilmot*, in the case of *Edie v. The East India Company* (2 Burr. 1227), that such an indorsement will have the effect of preventing a subsequent transfer of the bill for the benefit of any other than the person for whose use it is expressed to have been made by the indorsement. The case of *Ancher and others v. The Bank of England* (Doug. 637) is an authority to the same effect. The indorsement was not precisely in the same form as in the present

case; but the effect of it is the same. The indorsement there was, "The within must be credited to Captain Moreton L. Dahl, value in account." An indorsement purporting to have been made by Dahl was afterwards forged, and the Bank of England discounted the bill. The acceptors did not pay it; before it became due they had failed, and one Fulberg paid it for the honour of Ancher and Co., the plaintiffs; and upon the ground that the indorsement had restrained the negotiability of the bill, they brought an action for money had and received against the Bank. Lord *Mansfield* directed a nonsuit; but upon a rule to show cause why there should not be a new trial, and cause shown, Lord *Mansfield*, *Willes* and *Ashurst*, JJ., thought the indorsement restrictive, and that the plaintiffs were entitled to recover; but *Buller*, J., thought otherwise; upon which Lord *Mansfield* said, the whole turned on the question, whether the bill continued negotiable? And if they altered their opinion they would mention the case again; but it never was mentioned afterwards; and upon a new trial, Lord *Mansfield* directed the jury to find for the plaintiff, which they did. It has been said that the indorsement "Pay to Williams for my use," is a mere direction to Williams to apply the money procured by the bill to Sigourney's use; but the words taken in that sense would be useless; for whether the words be on the face of the indorsement or not, as soon as Williams received

the proceeds of the bill, he must necessarily apply them to Sigourney's use, and place them to his credit in the account between them. So that those words will have no effect whatever, unless they have that of restraining the negotiability of the bill, or at least of making the first indorsee (if he takes the bill with those words on it, as Williams did in this case) a trustee for the original indorser. The case of *Evans v. Cramlington* (Carth. 5; 2 Vent. 307; Skinn. 264; 1 Show. 4), when duly considered, does not seem to me to be sufficient to countervail to authorities to which I have adverted. The bill in that case was drawn by Cramlington upon one Ryder, payable to T. Price or his order, for the use of F. Calvert. Ryder accepted, but did not pay the bill. Price indorsed it to Evans for value. The latter brought an action against Cramlington the drawer; he pleaded that Calvert (who was named in the bill as *cestui que use*) was an officer of the excise, and indebted to the king in such a sum, and that upon an exchequer process at the suit of the king in such a sum, this £500 was extended in his hands. To this plea there was a demurrer. It appears, therefore, that Cramlington, in answer to the claim of Evans, the indorsee, set up what is sometimes denominated the *jus tertii*; and the only question which it was necessary for the Court to determine was, whether the bill being in trust only for the use of Calvert, was liable to be seized

under the extent against him? The Court were of opinion that it was not. The proposition of Cramlington, that the *jus tertii* intervened, failed entirely, and it became unnecessary to decide any other point. That case, therefore, as it seems to me, is not of sufficient weight to countervail the opinions delivered in *Snee v. Prescott* (1 Atk. 247), *Eddie v. The East India Company* (2 Burr. 1216), and *Anchor v. The Bank of England* (Doug. 637). The use of indorsements of this kind is not small, nor are they, as it seems to me, inconsistent with the interests and convenience of commerce. Such an *indorsement will not prevent the indorsee from receiving the money from the acceptor when the bill becomes due*. If he pay it to his principal all will be well, but the indorsee must look to him for the application of it. *It will have the effect of preventing a failing man from disposing of the bill before it becomes due, and from pledging it to relieve himself from his own debts at the expense of his correspondent*. I cannot see that the interests of commerce will be prejudiced by our holding that such an indorsement is restrictive. On the contrary, I think that the interests of commerce will thereby be advanced. It is said, that it cannot be expected that bankers or others when requested to discount such bills as this, should look into the accounts between the principal and his agent. I agree it cannot be expected they should; but still if they take the bill so

indorsed, they take it at their peril, and must be bound by the state of the accounts between those parties."

Although the property in negotiable instruments is ordinarily inseparable from the possession, nevertheless where "they come *mala fide* into a person's hands, they are in the nature of specific property; and if their identity can be traced, the true owner has a right to recover." Per Lord Mansfield, C. J., Cowp. 200. Thus where a person has discounted a negotiable instrument out of the ordinary course of business, and without giving full value for it, he cannot recover upon it. *Egan v. Threlfall*, 5 D & B. 326, 329 n.

For a long period, and in opposition to a case decided by Lord Kenyon (*Lawson v. Weston*, 4 Esp. 56), it seems to have been the general opinion that fraud or *mala fides* ought to be presumed where a negotiable instrument was taken under circumstances which ought to have excited the suspicion of a prudent man. See *Gill v. Cubitt*, 8 B. & C. 466; *Solomons v. The Bank of England*, 18 East, 135 n.; *Down v. Hulling*, 3 B. & C. 380; *Slater v. West*, Dans. & Lloyd, 15; *Beckwith v. Corral*, 3 Bing. 444.

It is now, however, very generally considered that these cases have gone too far and ought to be restricted, and that *gross negligence only ought to be considered as evidence of fraud*. In the case of *Lawson v. Weston*, 4 Esp. 56, it appeared that the indorsee of a bill of exchange for £500 either

lost it or had it stolen from him : its loss was immediately advertised. The plaintiffs, who were country bankers, discounted the bill in the usual course of their business, for a person who brought it to their shop, but was unknown to them. The bankers knew the handwriting of the parties to the bill, and upon the person for whom they discounted the bill putting his name on it, they, without any further inquiry, paid him the amount, deducting the discount. It was held by the Court of King's Bench, that the plaintiffs were entitled to recover the amount of the note. "If," said Lord *Kenyon*, "there was any fraud in the transaction, or if a *bond fide* consideration had not been paid for the bill by the plaintiffs, to be sure they could not recover; but to adopt the principle of the defence to the full extent stated, would be at once to paralyze the circulation of all the paper in the country, and with it all its commerce. The circumstance of the bill having been lost, might have been material, if they could bring knowledge of that fact home to the plaintiffs. The plaintiffs might or might not have seen the advertisement; and it would be going a great length to say, that a banker was bound to make inquiry concerning every bill brought to him to discount: it would apply as well to a bill for £10 as for £10,000. With respect to the evidence offered of the usage of other banking-houses, I cannot admit it: it depends on their mode of doing their business, or on their

funds. This could not affect others who acted on different principles, but with equal integrity. That which had been called the usage of trade, depended on the different degree of confidence which different men possessed, and not on any settled or regular rules.

"The magnitude of the bill has been pressed as a ground of suspicion by the defendant's counsel. I do not feel it of such importance. A person going to the country, and having occasion to bring a sum of money, might prefer bringing it in that way rather than in money. I therefore see no misconduct imputable to the plaintiffs; but I think they are bound, under the circumstances of the case, to prove the value actually paid for it." The plaintiffs proved the consideration paid for it, and had a verdict.

In *Raphael v. The Bank of England*, 17 C. B. 161, St. Paul and Co., money-changers at Paris, gave cash for a £500 bank-note, according to the course of exchange of the day, to a person who showed his passport, and wrote his name and address on the note. The note had been stolen about a year and a half before, and payment had been stopped and the loss advertised by means of handbills circulated amongst other places at Paris; and there was some evidence to show that one of the notices had come to the hands of St. Paul and Co. at Paris. It appeared that it was the practice of their house to file all notices of stolen or lost notes served upon them,

and to look to them if the amount was important; but that on this occasion the partner who changed the note did not look at the file, and had no recollection of the notice, or he would not have taken the note. It was held by the Court of Common Pleas, that the property in the note passed to St. Paul and Co. "It seems to me," said *Cresswell, J.*, "that the omission of St. Paul, who is substantially the plaintiff here, to avail himself of the means of knowledge of the alleged felony that were at his disposal, was not the point on which the decision of the case could properly be rested. A person who takes a negotiable instrument *bond fide* for value, has undoubtedly a good title, and is not affected by the want of title of the party from whom he takes it. His having the means of knowing that the security has been lost or stolen, and neglecting to avail himself thereof may amount to negligence: and Lord *Tenterden* at one time thought negligence was an answer to the action. But the doctrine of *Gill v. Cubitt* (3 B. & C. 466, 5 D. & R. 324) is not now approved of." See also *The Bank of Bengal v. Macleod*, 7 Moore, P. C. C. 85; *The Bank of Bengal v. Egan*, 7 Moore, P. C. C. 72; *Crook v. Jades*, 5 B. & Ad. 909; *Backhouse v. Harrison*, 5 B. & Ad. 1098; *Foster v. Pearson*, 5 Tyrw. 262; *Uther v. Rich*, 10 Ad. & Ell. 784. As to what instruments will be considered negotiable, see 1 Smith's Leading Cases, 398, 4th ed.

4. *Sale under Power expressly conferred or implied by Law.*—The owner of chattels may be bound by the sale of a person authorized by the law to effect it, as in the case of a sheriff selling goods under a writ of execution, in which case it seems a *bond fide* purchaser will be protected, though the writ be afterwards set aside (*Manning's case*, 8 Co. 94, b; *Doe v. Thorn*, 1 Mau. & Selw. 425), but it seems in the apparently analogous case of a purchase under a distress warrant a *bond fide* purchaser will not be protected, if the warrant be bad. See *Lock v. Sellwood*, 1 Q. B. 736, where Lord *Denman* thought that the analogy did not hold, but he did not, in fact, decide the point, because the Court was of opinion in that case that the purchase had not been made *bond fide*.

The owner of chattels will be bound by their sale, if he has placed them in the hands of persons whose business it is to sell them, in such a manner as to raise with respect to third persons an implied power to sell. See *Pickering v. Busk*, 15 East, 38, there a purchaser of hemp lying at wharfs in London had, at the time of his purchase, the hemp transferred in the wharfinger's books partly into the name of the broker who effected the purchase for him, and partly into the names of himself "or" the broker. It was held by the Court of Queen's Bench that the broker had an implied power to sell the hemp, and that his sale and receipt of the money bound

his principal. "Strangers," said Lord *Ellenborough*, C. J., "can only look to the acts of the parties, and to the external *indicia* of property, and not to the private communications which may pass between a principal and his broker: and if a person authorize another to assume the apparent right of disposing of property in the ordinary course of trade, it must be presumed that the apparent authority is the real authority. I cannot subscribe to the doctrine, that a broker's engagements are necessarily and in all cases limited to his actual authority, the reality of which is afterwards to be tried by the fact. It is clear that he may bind his principal within the limits of the authority with which he has been apparently clothed by the principal in respect of the subject-matter; and there would be no safety in mercantile transactions if he could not. If the principal send his commodity to a place where it is the ordinary business of the person to whom it is confided to sell, it must be intended that the commodity was sent thither for the purpose of sale. If the owner of a horse send it to a repository for sale, can it be implied that he sent it thither for any other purpose than that of sale? Or, if one send goods to an auction-room, can it be supposed that he sent them thither merely for safe custody? Where the commodity is sent in such a way and in such a

place, as to exhibit an apparent purpose of sale, the principal will be bound *and the purchaser safe*."

Where the owner of goods stands by and voluntarily allows another to treat them as his own, whereby a third person is induced to buy them *bond fide*, he cannot recover them from the vendee. *Gregg v. Wells*, 10 Ad. & Ell. 90; *Waller v. Drakeford*, 22 L. J. 274 (Q. B.).

An agent or person in possession of a bill of lading, India warrant, dock warrant, warehouse-keeper's certificate, warrant or order for delivery of goods, or any other document used in the ordinary course of business as proof of the possession or control of goods, or authorizing or purporting to authorize either by indorsement or by delivery, the possessor of such document to transfer or receive goods thereby represented, may in many cases, under the provisions contained in the Factors Acts (6 Geo. IV. c. 94, 5 & 6 Vict. c. 39), make a valid sale or pledge of the goods of another. See *Smith's Merc. Law*, 140-149, 6th ed.; *Smith's Leading Cases*, vol. i. p. 652.

As to the punishment of persons entrusted with the property of another for safe custody, selling, negotiating, transferring, pledging, or in any manner converting or appropriating such property or any part thereof to their own use with intent to defraud, see 20 & 21 Vict. c. 54.

THE TWEE GEBROEDERS, NORTHOLT, MASTER.

Nov. 27th, 1801.

[REPORTED 3 C. ROB. 336.]

PROTECTION OF NEUTRAL TERRITORY.]—*Territorial claim to protect capture, on the part of Prussia, held not to be established; vessel condemned.*

This was a case of considerable importance, as it respected the claim of a sovereign state for a right of territory over the spot where the capture in question was alleged to have taken place.

The case arose on the capture of vessels in the Groningen Watt, on a suggestion that they were bound from Hamburg to Amsterdam, then under blockade; and a claim was given under the authority of the Prussian minister, averring the place in question to be within the territories of the King of Prussia.¹

JUDGMENT.

SIR W. SCOTT.—This is the case of a ship and goods proceeded against for a breach of the blockade of Amsterdam; they are claimed as being taken on neutral territory; but it is denied, on the part of the captors, that they were *so* taken.

On the blockade of Amsterdam this Court has been inclined to hold generally, that all sea passages to Amsterdam by that great body of water, the Zuyder Zee, were blockaded, supposing those sea passages to be in the possession of the enemy: such as were in the possession of neutrals, it was of opinion were not included, unless

¹ The claim of the Prussian consul described the captured vessels to have been lying at anchor upon the Outhousen Watt, near Eems, close to the third beacon; and the capture to have been made, 14th of July, 1799, by a boat from the 'L'Espiegle,'

then lying in the Wester Balg, and also on the river Eems, and within the territories and dominions of his Prussian Majesty. The affidavit of the captors gave a different account of the situation of the capturing vessel.

the blockading force could be applied at the interior extremity of their communication. Whether the present capture in question was made in a sea passage to the Zuyder Zee, belonging to the enemy or to a neutral power, will be decided by the considerations which are to be examined on the further pursuit of this question. 2ndly. Supposing that question determined against the immunity of the place of capture, another question is proposed, whether the belligerent party having passed over neutral territory, *animo capiendi*, to the place where his rights have been exercised, those rights of capture so exercised are not thereby invalidated?

The capture is represented on both sides to have been made in the Watt, which runs along the coast of Groningen, by two or three of his Majesty's ships that went up the Eems. It is not, I think, contended, that the capturing ships were stationed on the neutral territory, unless the whole of the Watt passage is to be so considered. The precise place where the capturing ships lay is not very distinctly marked; but the balance of evidence inclines to establish, that they were on the other side a line of buoys, which Captain M'Kenzie swears were considered as being on Dutch territory, and that he placed his ship as near as possible in the place where some Dutch armed vessels (which were driven away on his approach) were stationed. On the whole that is to be collected from the evidence, as to the exact spot, I am led to suppose that the ships were not stationed on neutral territory, unless the whole of the Watt passage is to be so considered.

It is scarcely necessary to observe, that a *claim of territory is of a most sacred nature*. In ordinary cases where the place of capture is admitted, it proves itself; the facts happen within acknowledged and notorious limits; no inquiry is either required or permitted. But otherwise, when it happens in places which the neutral country does not possess by any general principle, or by any acknowledged right; in such a case, it being contended by those who represent the belligerent state, that no right exists, and that therefore the capture is free and legal, it can never be deemed an act of disrespect on the part of the foreign tribunal, if it proceeds to inquire into the fact of territorial rights—certainly not with a view of deciding generally upon such rights, but merely with respect to this particular fact of capture—not for the purpose of shaking or invalidating such rights, but that it may enforce a legal observance of them, if the facts on which they depend are competently established.

Something has been said in argument of the reverence due to

the assertion of princes whose claim is advanced; and this Court is disposed to pay the fullest measures of reverence which the case will allow. It is not improper to remark, that it is a question discussed much at length by foreign writers, on general law, in what cases the sole assertion of princes is to be taken as conclusive legal proof: and no principle is more universally established among them, than that the *mere assertion is not to be received as full and complete proof*, or as *Farrinacius* expresses it, "*Assertioni principis non statuitur quando agitur de propria ipsius principis, vel de ejus commodo aut interesse;*"¹ and, indeed, a contrary rule would carry the reverence due to these august personages to an extravagance that derided all reason and justice.

Strictly speaking, the nature of the claim brought forward on this occasion, is against the general inclination of the law; for it is a claim of private and exclusive property, on a subject where a general or at least a common use is to be presumed. It is a claim which can only arise on portions of the sea, or on rivers flowing through different states: the law of rivers flowing entirely through the provinces of one state is perfectly clear. In the sea, out of the reach of cannon shot, universal use is presumed. In rivers flowing through conterminous states, a common use to the different states is presumed. Yet in both of these, there may, by legal possibility, exist a peculiar property, excluding the universal or the common use. Portions of the sea are prescribed for; so are rivers flowing through contiguous states: the banks on one side may have been first settled, by which the possession and property may have been acquired, or cessions may have taken place upon conquests, or other events. But the general presumption certainly bears strongly against such exclusive rights, and the title is a matter to be established, on the part of those claiming under it, in the same manner as all other legal demands are to be substantiated, by clear and competent evidence.

The usual manner of establishing such a claim is either by the express recorded acknowledgment of the conterminous states, or by an ancient exercise of executive jurisdiction, founded presumptively on an admission of prior settlement, or of subsequent cession. One hardly sees a third species of evidence, unless it be, what this case professes to exhibit, the decision of some common superior in the case of a contested river. The sea admits of no common sovereign;

¹ Tunc enim illius assertioni minimè standum esse scripserunt Gabr. etc. et Aym. ubi exemplificat in principe asse-

rente castrum ad se pertinere. L. 2 tit. 6 Quest. 63 n. 173.

but it may happen that conterminous states, through which a river flows, may acknowledge a common paramount sovereign, who, in virtue of his political relation to them, may be qualified to appropriate exclusively and authoritatively, the rights of territory over such a river, to one or other of them.

It will be proper for me to consider, first, the natural quality and position of this place. It is the Watt passage, running along the Dutch coast of Groningen, and called the Groningen Watt to the Lower Zee. Some ancient history, traditional or other, has been alluded to indistinctly and without particular reference, as representing this Watt, with the neighbouring shoals, sands, and islands, to have formerly made part of the continent. If so, it must have formed part of Groningen—and if ever a part of Groningen, it is obvious that it was most unlikely to have been ceded. It must have been the whole substance and line of the external coast; the very last thing that would have been parted with to a neighbour, the very party with whom alone it was to be expected that frequent occasions of competition and quarrel would arise.

Supposing such an avulsion ever to have taken place, I must still apply to the present remaining coast the title of *external coast*; for it appears difficult to accede to the propriety of a phrase repeatedly used in this discussion, calling this the *interior of Germany*. How is it to be considered as interior? It is quite open and patent to the sea; there are no headlands that shoot beyond, so as to make what are called *Chambers*; no shores projecting extra. There are some islands beyond; one of which, Rottum, lies at a considerable distance, and rather at the eastern extremity, and is admitted, by these papers, to belong to *Groningen*, the *Dutch province*. So that if the certain legal effect of an island lying out at sea, could be to appropriate to the main land all the intermediate waters, these must belong to Groningen; with East Friesland, speaking physically, they can have nothing to do. They can be connected only politically, by some title of acquisition or conquest, of which no proof is or can be shown; or by the grant of a common superior, or by exercise of ancient jurisdiction, implying some one or more of these titles.

It is necessary for me to notice here another phrase which has been used, "that all this is *river* and not *sea*." That it is not quite so, is indisputably clear; it is true there are two passages which, during the reflux of the sea, carry down the river title of Eems a great way from the main land; and for the convenience

of navigation they are indicated by buoys : but surely it might be questioned, without impropriety, supposing no decided understanding in this particular case, how far such streams, beyond all capes and headlands, are *at all times* of the flow of the ocean to be deemed mere *river*. In common understanding, the *embouchure*, or mouth of a river, is that spot where the river enters the open space to which the sea flows, and where the points of the coast project no further. There may be shoals and sands beyond ; as on the coasts of this kingdom, the *Goodwin Sands* ; and buoys may be placed, and they may be distinguished from the sea at low water ; but what are these when the tide flows up, or at half-tide one way or the other ? undistinguishably parts of the ocean—*undique pontus*. I will not venture to lay down anything more positively on this matter, than that the nature of such sea passages must be held to be, *divisi imperii*, between the ocean and the main land ; and when the sea flows for navigation, they should rather seem to belong to the former than the latter. It is the less necessary to be precise on this point, because the capture in question did not happen in these streams, the Eastern or Western Eems, but in the Watt ; and supposing that these two passages were at all times *rivers*, and mere rivers, how does it follow that all the water with which they communicate are not only river, but parts of those rivers ? They seem, certainly, not to be so considered by the neighbouring states. Do they carry with them the name of Eems ? By no means. They have a denomination of their own. In the chart which has been exhibited, and is referred to on both sides, though not introduced by authority, how is the bank of land described ? The *new Zee dyke*, not the *river dyke*, which it ought to be, if the portion of waters was considered a river and not a sea ; how is the portion of waters at the other end of it to be denominated ? the lower Zee. What do the witnesses say ? It is stated in one affidavit, that Groningen extends as far as a man standing on the coast can throw a horseshoe. So the other witness uses the same expression, “ *standing on the coast*,” a word very strangely applied to a river, but the proper word applied to the sea. Where is the horseshoe to be thrown ? Into the *sea*, not into the *river*, as they all express themselves.

Conformable to this representation, are the terms in which the extreme shore is described, “ *buyten land* ”—*the without, or utmost land*—that point which has no headland beyond it. I observe, too, that at particular times of the tide, the Watt passage is totally

dry. The British captors walked over the sand to take possession of the ships, which were at that time lying on land, but they were compelled to retire by the reflux of the sea. It is then at high water to be taken as part of the sea, but at low water as part of the land. But of what land? of the land to which it is connected physically—the land of Groningen. It would be strange, indeed, that the jurisdiction of another country, separated by water, should extend beyond that water, over a space connected with the main land, and at times making an actual part of it.

But leaving this out of the case, on what grounds is the Watt to be considered as part of the Eems, which runs at one end of it, *at some states* of the tides; rather than as part of the sea, which *at all times* runs at the other end? Admitting that the two passages were at all times to be deemed the river Eems, how follows it that all sea passages communicating with it are to be deemed not only river, but parts of that river? On the mere physical circumstances, it is not too much to say, that the claim is against all special, as well as all general presumption; upon all visible circumstances it must be taken not as part of East Friesland, but either as part of the general sea or of the land of Groningen.

Does the history support the claim better than the geography? History supplies no proof of original occupancy or subsequent cession: as far as remote historical tradition goes, it seems to appropriate it to Groningen, and to speak of it as a part or parcel of that land, from which it has been since withdrawn by the irruption of the sea. But there is evidence of an historical nature offered of two kinds: 1st, there is an asserted grant of the Emperor, as a common sovereign, in 1454; and 2nd, the exercise of dominion. On the grant two things are to be ascertained: 1st, the authority; and 2nd, the effect. It would ill become this Court to question the extent of imperial rights; but it is not too much to say that the carving out a common river, even in the interior of Germany, into private and exclusive possession, is a very high act of prerogative; and it is not shown by any German jurist of authority that the relation which the Emperor, as head of that *feudal* confederacy, bears to its members, and which has been very different at different periods, did at any time, or particularly at the time in question, invest him with any such prerogative. Suppose this case, that an imperial grant did in the most express terms declare that one of the maritime provinces of the empire should not have its natural extent of sea-jurisdiction, but that

another province should possess it, and should confine and beard up its neighbour to the narrow extent within which a man can throw a horseshoe or ploughshare from the shore! No one can say that a foreign Court might not, without any immodesty or irreverence, desire some information respecting the constitutional validity of such a grant,—a grant which opposes all common principles, and which, coming from the general protector of the empire, deprives one province of its natural amplitude and means of defence, and exposes it to constant uneasiness and irritation from another province; and all this, without any assigned reason,—a grant which represents the whole German empire (a free constitution as it fundamentally is) subject to as capricious a state of dependence on its chief as can possibly be described.

But, 2ndly, no such injustice is imputable to the grant; for construing it, as I am compelled to do for the present purpose, I can attribute it to no such intended effect. What is it? It is truly described by the Prussian minister, Baron Jacobi, "*as conferring on Count Ulric the feudal investiture of East Friesland.*" It grants East Friesland in its full integrity, and no more; it enlarges no rights; it abridges no rights of another province; it grants nothing to the territory; it is a mere personal grant of that territory to the individual and his heirs. This is the general purview of the grant. What does it convey? *from the western Eems*—not inclusively: without any reference to established usage the terms could hardly be understood to inure to a grant of the western Eems itself; because it is not the natural construction of the words. And secondly, because it interferes with the national right of the conterminous province; for nobody denies that Rutrum belongs to Groningen, and that Borcum is the last Prussian island. It gives the river Eems and all other "*streams, rivers, and rivulets,*" as if dispositive of river navigations; but, whether it be or not, it is expressly qualified by the *reserve* "*of rights appertaining to East Friesland;*" so that it leaves everything on the footing of pre-existing rights, adding or diminishing nothing. This seems to be admitted by the persons authorizing the claim, and alleging this grant in support of it; for it is said on their part, *that the grant is to receive its construction from the later usage*, which usage is to be taken as evidence of the pre-existing right.

That being the case, there being no evidence of acquisition, no proof of cession, and no direct authority to be derived from the terms of the grant, the whole question is again reduced to usage.

If that is proved, it is certainly evidence of the most favoured kind. All men have a common interest in maintaining the sanctity of ancient possession, however acquired; ancient landmarks and ancient seamarks are *res sacerrimæ*, and whoever moves them *piaculum esto*. Then what is the natural evidence to be expected of ancient and constant usage? And how much of this has been produced? How is ancient jurisdiction proved on such a subject? By formal acts of authority, by holding courts of conservancy of the navigation, by ceremonious processions to ascertain the boundaries in the nature of perambulation, by marked distinctions in maps and charts prepared under public inspection and control, by levying of tolls, by exclusive fisheries, by permanent and visible emblems of power there established, by the appointment of officers specially designated to that station, by stationary guardships, by records and muniments, showing that the right has always been asserted, and whenever resisted, asserted with effect. This is the natural evidence to be looked for generally; and such as it is more particularly reasonable to require, where a right is claimed against all general principles, and also against the national rights and limits, and, indeed, against the independence and security of neighbouring states.

How much of this evidence is produced? A map or chart is produced, not published by authority, but adopted by authority; in which there is no distinction whatever made that applies to the support of this claim. Upon that map a person is examined at Emden, who puts a mark or distinction of his own as the limits of what he conceives to be the extremity of the Prussian territory. He proceeds to mention what is the only important fact in the case, on that side of the question; "that thirty-seven years ago he was employed in fixing buoys and beacons, and that whenever he or his fellows fixed them beyond that point, the Dutch took them up, and threw them away, considering them as signs of authority and jurisdiction." This cannot undoubtedly be considered as of little or no weight; but that it should be conclusive, cannot be maintained. One observation immediately arises on it, that if this man and his fellows did fix these buoys beyond these limits, *they* at that time either did not perfectly comprehend the meaning of the buoys, or the exact limits of the territory; because, if they considered them as indications of territory, how came they to place them beyond what are now assigned as the just limits, if these were recognized limits? This witness is confirmed by three

other persons, shipmasters of Emden and Papenberg, with respect to their belief and understanding of the matter; but without referring to any particular fact as the ground of their opinion. They only say, "that they understand the buoys and beacons at each extremity were marks of sovereignty;" but no beacons whatever appear to be marked in this chart, as in the Watt passage. And how is it possible that the Court can hold the buoys and beacons to be marks of sovereignty, when it appears that the city of Emden maintains establishments of that kind in the Island of Rottum, which is admitted to be a Dutch island belonging to Groningen? Indeed, the laying down buoys and beacons is not in its nature to be considered as a necessary indication of territory, nor is it so understood by foreign writers.¹ The laying them down may be a *servitus* and a burthen, or it may be neither; it may be only, that this is a navigation in which the city of Emden is much interested, and the Dutch comparatively little; and therefore are content to leave the care and expense of it upon their neighbours. The claim relies on these, *as proofs of sovereignty*; perhaps the evidence is rather to show it to be more directly a corporation right of the city of Emden; which of course would belong to the Count of East Friesland, the sovereign of that city. I do not mean to lay stress on this observation, any further than that if it is in any degree of that nature, it may somewhat enervate the evidence of the persons connected with that place; since the practice of the civil and imperial law hold principles very similar to those of our own municipal law, on the credit of testimony in such cases; and, on this particular question, the exceptions stated by Farinacius might not unfairly be objected against the Emden witness (if it were necessary to urge them), in a matter which concerned the right and jurisdiction of his own city.—"Limita, ut nec testes de universitate, ad favorem universitatis admittantur, quando esset magno affectio ob annexum commodum, ut puta quia ageretur de magno honore, vel de aliqua jurisdictione, aut etiam pro statu ipsius universitatis." And again:—"Si testis de universitate admittatur ad testificandum pro sua universitate, non est omni exceptione major, nec integræ fidei."—L. 2. t. 6; Qu. 60 n. 522–536.

¹"Iste autem modus vasa in flumine prominentia habendi, quod in transcurso notandum, non semper arguit dominium in mari aut flumine publico; cum etiam ab illis qui dominium tale non vendicant,

usurpari soleat, in securitatem navigationis, et libertatem commerciorum, illis in tali loco concessam."—Locosinus, De Jure Maritimo L. 2, ch. 1.

Then, with respect to the custom on which the claim is to be sustained, what is the evidence that is required of it? It is laid down by Gail, an imperial writer of credit on this subject¹, and by many other writers of the best authority, that there must be at least two witnesses to prove a custom; and that they must assign acts done as the ground of their belief. It is, indeed, doubted by them whether mere extrajudicial acts do afford sufficient evidence; they incline to think, however, that they do; but the whole course of their reasoning, on the nature of the evidence to be admitted, is very similar to our own municipal rules on this subject, which seem derived from the same sources.

As to all other evidence in this case, except the testimony of one person, speaking to the fact of his being employed to lay down buoys and of having had a scuffle with some Dutch persons as to the position of them, and excepting the depositions of two others speaking to *their belief only* without assigning any reason of fact, there is a total silence: there are no tolls but for the Barcum lighthouse; no water-bailiff, no court-rolls of any water jurisdiction, nothing in the nature of perambulation, no stationary officers or guardships. But, on the contrary, there is a most material fact arising, that the Dutch not only had guardships in the Groningen Watt, but that they exercised actual hostilities there; certainly this exercise of hostility is not conclusive evidence that the place

¹ Those who have any curiosity to inquire into the rules and practice of the imperial law, and the reasonings of the civil law writers on this subject, will find them treated of by Gail, lib. 2. ch. 3, De Consuetudine et Requisitis. Some of his positions are:—"Quod si frequentiam actuum, communis est opinio duos actuum lapsu temporis sufficere ad introducendam consuetudinem, hoc tamen moderamine, ut procedat, quando boni illi actus ita sunt notorii, ut verisimiliter in populi notitiam veniant; alias actus duo non sufficerent, sed tot requiruntur ut ex iis tacitus populi consensus colligi possit. Sed quid de actibus extrajudicialibus? Breviter, communis opinio tenet non solum actus judiciales sed etiam extrajudiciales sufficere, dummodo tales sint actus ut ex iis de tacito populi consensu constare possit. Modo ad proximum veniamus, qui

super consuetudine intentionem suam fundat, is eam probare debet, quia consuetudo facti est, et facta non presumuntur nisi probentur, et probare eam debet cum suis requisitis, alias succumbet. Proinde testes ad probandam consuetudinem producti, de hujusmodi requisitis cum ratione scientiæ deponere debent; quia non sufficit talem extare consuetudinem, sed necesse est dare rationem scientiæ, ut puta quia viderunt ita observari in similibus casibus et actibus, idque frequenter, et longo tempore, publicè, presentibus et scientibus multis personis, adeo quod inde appareat intercessisse consensum populi. Præterea testes in tempore et actuum identitate conveniri debent; alias si de diversis actibus deponerent, tamquam singulares, fidem non facerent."

where this happened was not Prussian territory; because it might be an irregularity on the part of the Dutch, and the subject of complaint on the part of Prussia; but as far as it appears in this evidence, it stands a naked fact; it does not appear to have been complained of as an irregularity or encroachment on the Prussian territory, and therefore it is not to be presumed by this Court that it is so to be considered.

On this evidence then, it is impossible for me to pronounce, that these captures are invalidated by being actually made on Prussian territory. There remains the other question, whether they are not vitiated by the capturing ship having passed over neutral territory to accomplish the capture? as it is alleged they passed up the Western Eems, and that the whole of that is Prussian territory. I have already intimated some doubts that might possibly be entertained upon the present evidence, whether the Western Eems is to be deemed at all times and in all parts of it clearly Prussian territory; but supposing it to be so, is it a violation of territory to have committed an act of capture after having passed over this territory to effect it? On this point there are some observations of law, and some of fact, that appear not unworthy of notice:—In the first place, the place of capture is accessible by other passages, not asserted to be neutral; it is not alleged that a hostile force might not have reached these ships by another route, through the Lower Zee, or other communications: it is not to be said that they were so enclosed and protected on all sides by neutral territory, that you could not approach them without passing over it. In the next place, it is not the case of an internal passage into the heart of the country, into the Homegat, if I may adopt their own term; it is a passage over an external portion of water, which you may prescribe for as territory, but not as inland river, or as part of the internal territory; it is not an entrance of an armed force up an inward passage, to reach an enemy lying in the interior of the land. Thirdly, it is an observation of law, that the passage of ships over territorial portions of the sea, or external water, is a thing less guarded than the passage of armies over land, and for obvious reasons. An army, in the strictest state of discipline, can hardly pass into a country without great inconvenience to the inhabitants; roads are broken up; the price of provisions is raised; the sick are quartered on individuals, and a general uncasiness and terror is excited; but the passage of two or three vessels, or of a fleet over external waters, may be neither felt nor perceived. For this reason, the act of inoffensively

passing over such portions of water, without any violence committed there, is not considered as any violation of territory belonging to a neutral state—permission is not usually required; such waters are considered as the common thoroughfare of nations, though they may be so far territory, as that any actual exercise of hostility is prohibited therein. Fourthly, it is to be observed, that the right of refusal of passage, even upon land, is supposed to depend more on the inconvenience falling on the neutral state, than on any injustice committed to the third party, who is to be affected by the permission. Grotius and Vattel both agree¹ that it is no ground of complaint, nor cause of war against the intermediate neutral state, if it grants passage to the troops of a belligerent, though inconvenience may ensue to the state beyond; the ground of the right of refusal being the inconvenience that such passages bring with them to the neutral state itself. This being the general state of the fact and of the law, it would be a proposition which could not be maintained in a full universal extent, that the passing over water, claimed as neutral territory, would vitiate any ulterior capture made on a third party. Suppose the case of a war between England and Russia, and that the Sound was the pass in question, over which Denmark claims and exercises imperial rights, on stronger grounds than can be maintained in support of this claim; or suppose a war between France and Russia, and the Dardanelles to be the pass in question; or suppose any two powers exercising hostilities in the Mediterranean, after having passed through the Straights of Gibraltar, occupied by an English fortress on one side, and by Tangier on the other, formerly in possession of this country; could it be said in any of these cases, that captures made beyond this point of passage over neutral water territory, would be invalidated on any principle of the law of nations? Where a free passage is generally enjoyed, notwithstanding a claim of territory may exist

¹ "On est aussi tenu de laisser passer librement par les terres, les fleuves et les endroits de la mer qui peuvent nous appartenir, ceux qui veulent aller ailleurs pour des justes causes; ou s'ils vont trafiquer avec un peuple éloigné, ou s'ils ont entrepris une guerre juste."—Grot. l. ii. c. 2, s. 13. "A toutes les nations ce devoir s'étend, aux troupes comme aux particuliers; mais c'est au maître du territoire de juger si le passage est innocent, et il est

très-difficile que celui d'une armée le soit entièrement; le seul danger qu'il y a à recevoir chez soi une armée puissante, peut autoriser à lui refuser l'entrée du pays." Vatt. l. iii. c. 7, s. 119-123. Grotius does not allow the right of refusal on this ground, but points out the precautions to which the intermediate state may resort:—"En faisant passage, les troupes, par petites bandes séparées, ou sans armes, ou lui demander otages."

for certain purposes, no violation of territory is committed, if the party, after an inoffensive passage, conducted in the usual manner, begins an act of hostility in open ground. In order to have an invalidating effect, it must at least be either an unpermitted passage, over territory where permission is regularly requested; or a passage under a permission obtained on false representation and suggestions of the purpose designed. In either of these cases there might be an original misfeasance and trespass, that travelled throughout and contaminated the whole; but if nothing of this sort can be objected, I am of opinion, that a capture, otherwise legal, is in no degree affected by a passage over territory, in itself otherwise legal and permitted.

Having before said that this act of capture was not exercised on neutral territory, as far as I am enabled to judge by the present evidence, I must pronounce that no sufficient objections are shown against the validity of these captures; and that the ships must be adjudged lawful prize to the captors, being bound to Amsterdam in breach of the blockade.

No proposition is better established than that a belligerent is forbidden by the principles of international law, to exercise hostilities within the territorial jurisdiction of a neutral state. Thus, although it is doubtless a general rule in maritime warfare, that a belligerent has a right to seize property which belongs to the enemy, or which is of a hostile character, wherever it is found, an exception to that rule has been long since established in the protection against capture afforded by a neutral territory. See *Vrouw Anna Catherina, Mahte*, 5 C. Rob. 15, 16. If a capture be really made within neutral territory, it is a nullity, and the property must be restored, notwithstanding that it may actually

belong to the enemy. And if the captor should appear to have acted wilfully, and not merely through ignorance, he will be subject to further punishment. *Ib.*

The law upon the subject is clear, but difficulties often arise, as in the principal case, in determining the limits of the neutral territory, and whether the capture or other hostile act took place within it.

As is laid down in the principal case, the territory of country at sea extends about three miles from the shore, as that has been considered to be out of the reach of cannon-shot; the rule being founded upon the well-known maxim, "*terræ dominium finitur, ubi finitur armorum vis.*" *The Anna, La Porte*,

3 C. Rob. 385 c. Any capture then made at sea within three miles from the coast of a neutral country will be clearly illegal.

When this rule was laid down, three miles seems to have been the extreme limit of the range of warlike projectiles: it has since been greatly increased. On principle, therefore, it would seem to follow that there should be a proportionate extension of the neutral territory at sea. In other words, if a cannon of improved construction can throw a ball or shell five miles from the shore, the neutral territory and the protection which it affords should be extended at sea to the same distance from the shore.

Where the exact measurement cannot easily be obtained, the Court will not willingly act with an unfavourable minuteness towards a neutral state, but will be disposed to calculate the distance very liberally (*The Twee Gebroeders, Alberts*, 3 C. Rob. 163), and will take into consideration other circumstances favourable to the claim of the territory on which the capture was effected being neutral; as, for instance, when the place in question is a sand covered with water only on the flow of the tide, and immediately connected with the land of the neutral territory, so as when dry to be considered as making part of it. *Ib.*

The right of territory will be reckoned from islands which are appendages of the coast, and not merely from the mainland. Thus, in the case of *The Anna, La Porte*,

5 C. Rob. 373, it appeared that there were a number of little mud islands composed of earth and trees drifted down by the river Mississippi, and which formed a kind of portico to the mainland. The capture in question took place within three miles of these islands, but beyond that distance from the mainland. It was contended that such islands were not to be considered as any part of the territory of America; that they were a sort of "no man's land," not of consistency enough to support the purposes of life, uninhabited, and resorted to only for shooting and taking birds'-nests. It was also argued that the line of territory was to be taken only from the Balise—a fort raised on made land by the former Spanish possessors. Lord *Stowell*, however, held that the protection of territory was to be reckoned from those islands. "They are," he observed, "the natural appendages of the coast on which they border, and from which, indeed, they are formed. Their elements are derived immediately from the territory; and on the principle of alluvium and increment, on which so much is to be found in the books of law, Quod vis fluminis de tuo prædio detraxerit, et vicino prædio attulerit, palam tuum remanet (Inst. Lib. ii. Tit. 1, § 21), even if it had been carried over to an adjoining territory. Consider what the consequence would be if lands of this description were not considered as appendant to the mainland, and as comprised within the

bounds of territory. If they do not belong to the United States of America, any other power might occupy them; they might be embanked and fortified. What a thorn would this be in the side of America! It is physically possible at least that they might be so occupied by European nations, and then the command of the river would be no longer in America, but in such settlements. The possibility of such a consequence is enough to expose the fallacy of any arguments that are addressed to show that these islands are not to be considered as part of the territory of America. Whether they are composed of earth or solid rock, will not vary the right of dominion, for the right of dominion does not depend upon the texture of the soil."

The maritime territory of every state, moreover, extends to the ports, harbours, bays, mouths of rivers, and adjacent parts of the sea enclosed by headlands, belonging to the same state. Wheaton, *Internat. Law*, 233, 6th ed.

The exclusive territorial jurisdiction of the British Crown over the inclosed parts of the sea along the coasts of the island of Great Britain, has immemorially extended to those bays called the King's Chambers; that is, portions of the sea cut off by lines drawn from one promontory to another. A similar jurisdiction is also asserted by the United States over the Delaware Bay, and other bays and estuaries forming portions of their territory. It appears from Sir

Leoline Jenkins, that both in the reigns of James I. and Charles II. the security of British commerce was provided for by express prohibitions against the roving or hovering of foreign ships of war so near the neutral coasts and harbours of Great Britain as to disturb or threaten vessels homeward or outward bound; and that captures by such foreign cruisers, even of their enemies' vessels, would be restored by the Court of Admiralty, if made within the King's Chambers. So, also, the British "Hovering Act," passed in 1736 (9 Geo. II. cap. 35), assumes, for certain revenue purposes, a jurisdiction of four leagues from the coasts, by prohibiting foreign goods to be transhipped within that distance, without payment of duties. A similar provision is contained in the revenue laws of the United States; and both these provisions have been declared, by judicial authority in each country, to be consistent with the law and usages of nations. *Ib.* 235; and see *Life and Works of Sir Leoline Jenkins*, vol. ii. pp. 727, 728, 780.

Again, the straits and sounds, bounded on both sides by the territory of the same state, and so narrow as to be commanded by cannon-shot from both shores, and communicating from one sea to another, will by the usages of international law be considered as belonging to the maritime territory of such state. *Ib.* 248.

In the sea out of cannon-shot, as is laid down in the principal

case, universal use is presumed, though by legal possibility this presumption may be rebutted by proof of the existence of a peculiar property excluding the universal or common use. *Ante*, p. 624.

Inland lakes and seas entirely enclosed within the limits of a state, are considered part of its territory. Wheaton, *Internat. Law*, 252.

With regard to rivers, where the land on both banks belong to the same state, they clearly form part of its territory, from their sources to their mouths, including the bays or estuaries formed by their junction with the sea. *Ib.*; and see *The Anna, La Porte*, 5 C. Rob. 385.

In rivers flowing through conterminous states, as is laid down in the principal case, a common use to the different states is presumed. *Ante*, p. 624. The boundary, however, between the two states being the *medium flum*, or the middle of the channel. Wheat. *International Law*, p. 252, 6th ed.

This common use may, however, be rebutted by proof of a peculiar property. "The banks on one side," observed by Sir *William Scott* in the principal case, "may have been first settled, by which the possession and property may have been acquired, or cessions may have taken place upon conquests, or other events." *Ante*, p. 624.

The proof, however, of this peculiar property must be clear, for, adds the learned Judge, "the general presumption certainly bears strongly against such exclusive

rights, and the title is a matter to be established on the part of those claiming under it, in the same manner as all other legal demands are to be substantiated, by clear and competent evidence." *Ante*, p. 624.

Having briefly noticed what will be considered as coming within the maritime territory of a state, we may again observe that any capture on the part of a belligerent effected at a place clearly *within* the limits of such territory will be illegal.

Moreover, a capture made by the commander of a vessel stationed within neutral limits, of another vessel lying beyond its limits, will be invalid. Thus, where an English ship of war lying in the Eastern Eema, a neutral territory belonging to Prussia, sent out armed boats by which she captured certain Dutch ships beyond the limits of such territory, it was held by Sir *William Scott* that the capture could not be maintained, and accordingly he directed the vessels to be restored. "It is said," observed the learned Judge, "that the ship was in all respects observant of the peace of the neutral territory; that nothing was done by her which could affect the right of territory, or from which any inconvenience could arise to the country, within whose limits she was lying; inasmuch as the hostile force which she employed was applied to the captured vessel *lying out* of the territory. But that is a doctrine that goes a great deal too far; I am of opinion that no use of a neutral territory, for

the purposes of war, is to be permitted; I do not say *remote* uses, such as procuring provisions and refreshments, and acts of that nature which the law of nations universally tolerates; but that no *proximate* acts of war are in any manner to be allowed to originate on neutral grounds; and I cannot but think that such an act as this, that a ship should station herself on a neutral territory, and send out her boats on hostile enterprises, is an act of hostility much too immediate to be permitted: for, suppose that even a *direct hostile use* should be required to bring it within the prohibition of the law of nations, nobody will say that the act of sending out boats to effect a capture, is not itself an act directly hostile,—not complete, indeed, but inchoate and clothed with all the character of hostility. If this could be defended, it might as well be said that a ship lying in a neutral station might fire shot on a vessel lying out of the neutral territory; the injury in that case would not be consummated nor received on neutral ground; but no one would say that such an act would not be an hostile act, immediately commenced within the neutral territory. And what does it signify to the nature of the act, considered for the present purpose, whether I send out a cannon-shot which shall compel the submission of a vessel lying at two miles distance, or whether I send out a boat armed and manned to effect the very same thing at the same distance? It is in both cases

the direct act of the vessel lying in neutral ground; the act of hostility actually begins, in the latter case, with the launching and manning and arming the boat that is sent out on such an errand of force.

“If it were necessary, therefore, to prove that a *direct* and *immediate* act of hostility had been committed, I should be disposed to hold that it was sufficiently made out by the facts of this case. But direct hostility appears not to be necessary; for whatever has an immediate connection with it is forbidden: you cannot, without leave, carry prisoners or booty into a neutral territory, there to be detained, because such an act is an immediate continuation of hostility. In the same manner, an act of hostility is not to take its commencement on neutral ground. It is not sufficient to say it is not *completed* there—you are not to take any measure there that shall lead to immediate violence; you are not to avail yourself of a station on a neutral territory, making, as it were, a vantage ground of the neutral country—a country which is to carry itself with perfect equality between both belligerents, giving neither the one or the other any advantage. Many instances have occurred in which such an irregular use of a neutral country has been warmly resented, and some during the present war; the practice which has been tolerated in the Northern States of Europe, of permitting French privateers to make stations of their ports and to sally out to capture British vessels in that neighbour-

hood, is of that number; and yet even that practice, unfriendly and noxious as it is, is less than that complained of in the present instance; for here the ship, without sallying out at all, is to commit the hostile act. Every government is perfectly justified in interposing to discourage the commencement of such a practice; for the inconvenience to which the neutral territory will be exposed is obvious; if the respect due to it is violated by one party, it will soon provoke a similar treatment from the other also; till, instead of neutral ground, it will soon become the theatre of war." *Twee Gebroeders, Alberts*, 3 C. Rob. 162.

In a subsequent case Sir *William Scott* said, "Captors must understand that they are not to station themselves in the mouth of a neutral river for the purpose of exercising the rights of war from that river, much less in the very river itself. . . . The captors appear by their own description to *have been standing off and on*, obtaining information at the Balise, overhauling vessels in their course down the river (Mississippi), and making the river as much subservient to the purposes of war, as if it had been a river of their own country. This is an inconvenience which the States of America are called upon to resist, and which the Court of Admiralty is bound on every principle to discourage and correct." *The Anna, La Porte*, 5 C. Rob. 385, e.

But, although the practice of making a neutral harbour an ha-

bitual station for captures was strongly reprobated by Sir *William Scott*, he has nevertheless laid it down as his opinion that "if whilst a privateer is *accidentally* lying in a neutral harbour she sees an enemy approaching, she may go out and capture, without any violation of the peace or immunity of the neutral port, provided that be done beyond the limits of the port." *Vrouw Anna Catherina, Mahts*, 5 C. R. 15, 18.

It has been contended that the act of capture is to be carried to the commencement of the pursuit, and that if a contest begins before, it is lawful for a belligerent cruiser to follow, and to seize his prize within the territory of a neutral state. And *Bynkershoek* has been cited as an authority upon this point, who after a discussion of some length, with some qualifications, arrived at this result:—"Uno verbo, territorium communis amici valet ad prohibendam vim quæ ibi inchoatur, non valet ad inhibendam, quæ extra territorium inchoata, dum fervet opus, in ipso territorio continuatur." *Qu. Jur. Pub.* p. 66. In *The Anna, La Porte*, 5 C. Rob. 373, 385 d, where the capture of the vessel after a chase, had been effected at the mouth of the river Mississippi, Sir *W. Scott*, in reference to the authority of *Bynkershoek* upon this point, observes, "True it is that that great man does intimate an opinion of his own to that effect; but with many qualifications, and as an opinion, which he did not find to have been

adopted by any other writers. I confess I should have been inclined to have gone along with him to this extent, that if a cruizer, which had before acted in a manner entirely unexceptionable, and free from all violation of territory, had summoned a vessel to submit to examination and search, and that vessel had fled to such places as these, entirely uninhabited, and the cruiser had without injury or annoyance to any person whatever, quietly taken possession of his prey, it would be stretching the point too hardly against the captor to say that on this account only it should be held an illegal capture. If nothing objectionable had appeared in the conduct of the captors before, the mere following to such a place as this is, would, I think, not invalidate a seizure otherwise just and lawful."

It was decided in the principal case that where a free passage over a portion of the sea is generally enjoyed, notwithstanding a claim of territory may exist for certain purposes, no violation of territory is committed, if a party after an inoffensive passage over the water, conducted in the usual manner, begins an act of hostility and effects a capture, beyond the neutral territory. "Suppose," said the learned Judge, "the case of a war between England and Russia, and that the Sound were the pass in question, over which Denmark claims and exercises imperial rights on stronger grounds than can be maintained in support of this claim; or suppose a

war between France and Russia, and the Dardanelles to be the pass in question; or suppose any two powers exercising hostilities in the Mediterranean, after having passed through the Straits of Gibraltar, occupied by an English fortress on the one side, and by Tangier in the other, formerly in possession of this country; could it be said in any of these cases, that captures made beyond this point of passage over neutral water territory, would be invalidated on any principle of the law of nations." *Ante*, p. 633. The capture, however, might be invalidated by an unpermitted passage over territory where permission is regularly requested, or a passage under a permission obtained on false representation, and suggestions of the purpose designed. *Ib.* 634.

A claim for the restitution of property, captured by a belligerent from the enemy, upon the suggestion that the capture was effected within the limits of neutral territory, cannot be set up by an individual claimant as the owner of the property, but it must proceed from the government, whose territory is asserted to have been violated. *Etrusco*, 3 C. Rob. 162, n.; and see *La Purissima Conception*, 6 C. Rob. 45, 47; *The Diligentia*, 1 Dods. 413; *The Eliza Ann and others*, 1 Dods. 245.

But in order to give effect to a claim of this kind, it must be shown that the party making it was then in a state of clear and

indisputable neutrality. If he has shown more favour to one side than to the other, if he has excluded the ships of one of the belligerents from his ports, and hospitably received those of the other, he cannot be considered as acting with the necessary impartiality. A country showing such an invidious distinction is not entitled to claim in the character of a neutral state. The high privileges of a neutral are forfeited by the abandonment of that perfect indifference between the contending powers in which the essence of neutrality consists. *The Eliza Ann*, 1 Dod. Adm. Rep. 244, 245.

Where the capture has been made when the situation of the vessel captured was too dubious to affect the parties with any intentional violation of neutral rights, or has arisen from misapprehension and mistake, the restitution will be ordered without making the captors pay costs or damages. (*The Twee Gebroeders, Alberts*, 3 C. R. 162, 166.) Where, however, there has been a clear violation of neutral territory, and *à fortiori* if there has been misconduct on the part of the captors, as by their making the seizure without sufficient grounds, or bringing the prize to England when they might have obtained an adjudication at a Court nearer the scene of action, the captors will be decreed to pay costs and damages. *Ib.*; *The Anna, La Porte*, 5 C. R. 373, 385, h.

In certain cases, where the neu-

tral state does not obtain redress for a capture effected by one of the belligerents within its territory, it may be bound to make compensation to the other belligerent whose property has been so captured.

It has, however, been recently assumed or laid down that the neutral state will be released from all responsibility on account of any capture which takes place within its territory, where the commander of the captured vessel has resort to force, without in the first instance demanding the protection of the neutral state. Thus, in a valuable note to Wheaton's *International Law*, p. 493, 6th ed., it is said that "a case of violation of neutral territory occurred in the destruction, in the harbour of Fayal, in September, 1814, of the American privateer 'General Armstrong,' by an English squadron. Reclamations, founded on it, were made against the government of Portugal, which were, by the 2nd Article of the Treaty of 26th February, 1851 (Treaties of the United States, 1854, p. 22), agreed to be submitted to the arbitration of a sovereign, potentate, or chief of some nation in amity with both the high contracting parties. Under this provision Louis Napoleon, the President of the French Republic, was selected as arbitrator. There is some discrepancy between the American statement and the summary of facts on which the award proceeds. The Prince President, however, in pronouncing that no indemnity was due from

Portugal, does not deny the responsibility of a neutral to make compensation to a belligerent, whose property has been captured or destroyed within its jurisdictional limits by the opposing belligerent; but he bases his decision on the assumed fact that the American commander had not applied from the beginning for the intervention of the neutral sovereign; that by having recourse to arms, to repel an unjust aggression of which he pretended to be the object, he had himself failed to respect the neutrality of the territory of the foreign sovereign,

and had thereby released that sovereign from the obligation to afford him protection by any other means than that of pacific intervention; and that the Portuguese government could not be held responsible for the result of the collision which took place, in contempt of its rights of sovereignty, and in violation of the neutrality of its territory, and without the local officers being required, in proper time, to grant the necessary aid and protection." See Cong. Doc. 32; Cong. 1st Sess. H. Rep. Ex. Doc. No. 53; 32 Cong. 2 Sess. Senate Ex. Doc. No. 24.

THE MARIA, PAULSEN, MASTER.¹

◆

June 11, 1799.

[REPORTED 1 C. ROB. 340.]

RIGHT OF VISITATION AND SEARCH.]—*A vessel sailing under convoy of an armed ship, for the purpose of resisting visitation and search, condemned.*

This was the leading case of a fleet of Swedish merchantmen, carrying pitch tar, hemp, deals, and iron, to several ports of France, Portugal, and the Mediterranean, and taken, January, 1798, *sailing under convoy of a ship of war*, and proceeded against for resistance of visitation and search by British cruisers.

In December, 1797, this case coming on to be argued on the original evidence, the Court directed further information to be given by both parties, respecting the precise acts that took place at the time of capture, the instructions under which the convoyed ships were sailing, and also the instructions to the Swedish frigate.

On a subsequent day, this information being procured, it was argued at much length.

On the part of the captors, the King's Advocate and Arnold, in substance, contended, if the case of the ship and cargo were to be considered singly, and separated from the principal question of convoy, there are many circumstances attending it of a very noxious aspect. It was going on an asserted destination to Genoa, at a time when that port was become almost a hostile port, by its subserviency to all the purposes of the French marine, whilst our ships and cruisers were absolutely excluded. It was going under the certificate of the French consul, in compliance with the unjust decree of the French government,² and the articles of which the

¹ Affirmed on appeal, July 2nd, 1802.

² Decree 18th January, 1797:—"L'état des navires en ce qui concerne leur qualité de neutre ou d'ennemi sera dé-

terminé par leur cargaison; en conséquence tout bâtiment trouvé en mer, chargé en tout ou en partie de marchandises provenant d'Angleterre ou de ses

cargo consisted were articles of a contraband nature. It is true they are such articles as the Swedes are now permitted to carry in time of war, under certain circumstances, but only under a strict observance of good faith, a conduct perfectly neutral, and in all cases subject to a right of pre-emption on the part of a belligerent nation. And farther, the truth of this asserted destination to Genoa is exposed to great suspicion from the discretionary power with which the master was entrusted, of going elsewhere.

These are circumstances unfavourable in themselves; but they assume a more distinct hostile character from the circumstance of being taken sailing under the protection of an armed force, and associated for the purpose of resisting visitation and search from the cruisers of this country. The act of resistance to the lawful rights of search, is the ground on which it is principally contended that this case is subject to confiscation. For although this fact may receive colour and complexion of a more hostile nature from other circumstances, it is alone sufficient to incur the penalty of confiscation. The right of visitation and search in time of war, even in the most innoxious cases, is an established right of belligerent powers, acknowledged and referred to in the treaties of the states of Europe. It is admitted by all speculative writers on the laws of nations. Bynkershoek expressly admits it in these words: "*Velim animadvertas, eatenus utique licitum esse amicam navem sistere, ut non ex fallaci forte aplus tri, sed ex ipsis instrumentis in navi repertis constet, navem amicam esse.*"—Lib. i. ch. 14. And Vattel, lib. iii. § 114, acknowledges the penalty attending the contravention of this right by neutral ships to be confiscation. Even in cases where it is possible this right may be wrongfully exercised by cruisers, resistance is not the legal remedy, as there is a regular and effectual remedy, provided by all the maritime codes of Europe, in the responsibility which cruisers lie under to make compensation for any injurious exercise of their right in costs and damages. These principles being admitted, as they were indeed admitted in the former hearing, it becomes a question of fact, whether there was that hostile resistance that will subject the parties to the penalty of

possessions, sera déclaré de bonne prise, quel que soit le propriétaire de ces denrées ou marchandises." See Atcheson's Report of a case in the King's Bench, Appendix, page 155, where the reader will see the late regulations of the French government in matters of prizes.

In consequence of this decree, all neutrals were required to take a certificate from the French consuls, that their goods were not of British produce or manufacture.

confiscation. On this point it is submitted that the instructions of the Swedish government to the commander of this convoy¹ lay upon him as a positive injunction to prevent search by all possible means, and "that violence must be opposed by violence." These are carried into execution by the sailing orders,² which forbade their merchantmen "to submit to search; but if any boat attempted to come alongside, to sheer off from them." It is still further carried into effect by all that passed at the time; and more especially by the act of forcibly removing an officer who had taken possession of one ship, and carrying him on board the frigate. And it is again confirmed by the regret which the commander expressed that he had not fired, protesting "that if the ships had not been seized at night he would have resisted."

For the claimants, Lawrence and Swabey.—The original importance of this question, great as it undoubtedly was, has been very materially increased by the manner in which it has been brought on.

The claimants have reason to complain that everything has been brought forward *ex parte* by the captors. The instructions of the Swedish commander are produced in an unauthenticated form, and introduced only under a note from the under-secretary of state. It is not proved that they were the whole of the instructions. It must, therefore, rest with the Court to say how far they are sufficiently authenticated. The instructions under which the English commander acted have been altogether withheld. On the part of the claimant's evidence, the officer of the Swedish frigate has been

¹ Instructions to the commander:—
"In case the lieutenant-colonel should meet with any ships of war of other nations, one or more of any fleet whatever, then the lieutenant-colonel is to treat them with all possible friendship, and not give any occasion of enmity; but if you meet with any foreign armed vessel, which on speaking should be desirous of having still further assurance that your frigate belongs to the King of Sweden, then the lieutenant-colonel is, by the Swedish flag and salute, to make them know that it is so; or if they would make any search among the merchant ships which are under your convoy, which ought to be endeavoured to be prevented as much as possible, then the lieutenant-

colonel is, in case such thing should be insisted on, and that remonstrances could not be amicably made, and that, notwithstanding your amicable deportment, the merchant ships shall be nevertheless violently attacked, then violence must be opposed against violence."

² *Sailing instructions to the merchantmen.*—"All merchantmen ships, during the time they are under convoy of his Majesty's ships, frigates, or sloops, are forbidden to suffer the boats of any foreign nation to board them for the sake of visitation or searching; but in case such boats show an intention to come alongside, the merchant ships are to sheer off from them."

sent away to render an account to his own government, and by that means the parties are deprived of the benefit of his evidence. Under these disadvantages, however, it is still to be contended that there has been no act of hostility committed against this country. There is no disposition to assert a right, on the part of neutral merchant ships, to resist visitation and search by the cruisers of a belligerent state. It is not to be argued, undoubtedly, that neutrals have a right in all cases to resist search. If such a speculative doctrine is asserted by any states, it is for them to maintain it. In the present case we stand upon no such position, but upon something which appears to have been overlooked—a treaty on this important question of search between the two countries—Treaty between England and Sweden, 1661, art. 12. After an express treaty, it is not allowable to presume anything contrary to that compact on the part of the other state, nor to argue on general principles to defeat the force of the obligation arising from it on our parts. Search is by this treaty to be exercised only on a refusal to produce the certificates or ship's papers; in no other case is it justifiable. And although a strong suspicion might still justify a seizure under the responsibility of costs and damages, still, in the manner of making this seizure (and the whole of this case rests on the course of the proceedings), if we did not proceed in the manner in which we ought to have done, there is an end of our right under the compact; and we are not at liberty to impute anything that ensued in consequence of our own irregularity, as an act of aggression against the other party. These are the principles on which it is intended to support the present claim. Originally, and in its natural appearance, this convoy is to be considered as a neutral convoy; and therefore it lies on the captor to show by some act that there was a departure from neutrality; for it cannot be pretended that a mere intention (if it were proved) would be sufficient, under any system of law, to incur the penalty of an actual offence. It seemed to be admitted by the Court on a former day, that there was a just distinction to be made between two cases of convoy—between a convoy of an enemy's force and a neutral convoy. The former would stamp a primary character of hostility on all ships sailing under its protection; and it would rest with the parties to take themselves out of the presumption raised against them. But that it would be, even in that case, nothing more than a presumption, is determined by a late case before the Lords—*The Sampson Barney*—an asserted American armed ship, sailing with French

cruisers at the time they engaged some English ships, and communicating with the French ships by signal for battle. In that case, although there had been a condemnation below, the Lords sent it to further proof, to ascertain whether there had been an actual resistance. [COURT.—I do not admit the authority of that case to the extent you push it. That question is still reserved, although the Lords might wish to know as much of the facts as possible.]

In the other case of a neutral convoy, there is no presumption of a hostile character arising from it, and therefore it remains with the captors to show that there was an actual resistance in this case. Coming then to the question of fact, with the provisions of the treaty kept constantly in view, and remembering that when there is a treaty regulating the mode and manner of proceeding, both parties are bound to proceed accordingly, and that any presumptions which are raised should proceed upon the words of that compact, and not depart from it, where will the captors find any actual resistance in the conduct of these parties?

The instructions are relied upon, but they are general, and do not, any more than the other circumstances preceding or attending this transaction, point in any degree to a resistance towards this country. It is notorious, that at the time of passing the French decree against English merchandize, which is deservedly reprobated on all sides, the Swedish merchants did apply for a protection of this kind; and, therefore, the probability is at least as great, that it was intended to protect them against French cruisers as against this country. The directions are "to observe an amicable deportment, but that violence must be opposed by violence;" expressions on which it will not be fair to put any other construction than what is compatible with the provisions of the treaty, or to suppose that they meant more than that the stipulations of the treaty were to be faithfully maintained. What passed then at the time? Was there anything like actual personal resistance? Certainly not. From the evidence of M'Dougal, it appears that there was nothing like an hostile appearance shown towards the 'Wolverine,' till after four days had passed in discussion between the commanders. The Swedish commander had a right to expect to have been first addressed; under the treaty the certificates should have been demanded. If not produced, the ships might have been searched; and, on strong suspicion, seizure might have been made. But the question is, have the captors proceeded

in this way? If, in opposition to this, they have at once superseded all forms and said, "We seize and detain them," the matter assumes a different aspect, and we have no right to exact a rigid observance of form on the other side. On describing the convoy, what was done on the part of the captors? It was on that side that the first appearance of menace was shown. The English ships immediately beat to quarters; the destination is inquired of, and an answer given; but there is no demand for papers; no attempt to search. Captain Lawford states, that, as a measure of prudence, he sent immediately to the Admiralty for particular instruction, and received orders to detain the convoy. On the first interview, the Swedish commander immediately communicated his instructions with the greatest readiness; from which it appears that, in his opinion, they contained nothing hostile to this country. The removal of a petty officer, that has been relied on as an act of resistance, was more a matter of form than actual opposition, and as a sort of protest against the irregular proceeding of the captors, and did not for a moment retard the actual delivery of possession on the part of the merchantmen. The subsequent acts show still more strongly how little the acts of the captors were directed by the treaty; and how little they themselves thought that any penalty of prize had accrued to them by this circumstance of convoy. Instead of the usual demand for the ship's papers in the first instance, they were not demanded till August. They were afterwards returned to one vessel, and an offer was made to all those bound to neutral ports to depart; but they refusing to go without some compensation for detention, proceedings were then instituted for the first time, on the principles of convoy—a principle which cannot now come into discussion, owing to the irregular proceedings of the captors; and which, besides, cannot fairly be enforced against the merchantmen by this Court, whilst the government has permitted the frigate to depart, and has declined to consider the act of the commander as an act of hostility against the state. On these grounds, and adverting to former practice, in which some instances occur of restitution of ships taken under convoy, whilst no precedents of condemnation on this principle are adduced, it is submitted that the claimants have done nothing to forfeit their neutral character, and are therefore entitled to restitution.

JUDGMENT.

SIR W. SCOTT.—This ship was taken in the British Channel, in company with several other Swedish vessels sailing under convoy of a Swedish frigate, having cargoes of naval stores and other produce of Sweden on board, by a British squadron under the command of Commodore Lawford.

The facts attending the capture did not sufficiently appear to the Court upon the original evidence ; it therefore directed further information to be supplied, and by both parties.

The additional information now brought in consists of several attestations made on the part of the captors, and of a copy of the instructions under which the Swedish frigate sailed, transmitted to the King's Proctor from the office of the British Secretary of State for the Foreign Department. On the part of the Swedes some attestations and certificates have been introduced, but all of them applying to collateral matter, none relating immediately to the facts of the capture. On this evidence the Court has to determine this most important question ; for its importance is very sensibly felt by the Court. I have, therefore, taken some time to weigh the matter maturely ; I should regret much if that delay has produced any private inconvenience ; but I am not conscious (attending to the numerous other weighty causes that daily press upon the attention of the Court) that I have interposed more time in forming my judgment than was fairly due to the importance of the question and to the magnitude of the interests involved in it.

In forming that judgment, I trust that it has not escaped my anxious recollection for one moment, what it is that the duty of my station calls for from me ;—namely, to consider myself as stationed here, not to deliver occasional and shifting opinions to serve present purposes of particular national interest, but to administer, with indifference, that justice which the law of nations holds out, without distinction, to independent states, some happening to be neutral and some to be belligerent. The seat of judicial authority is, indeed, locally here, in the belligerent country, according to the known law and practice of nations ; but the law itself has no locality. It is the duty of the person who sits here to determine this question exactly as he would determine the same question if sitting at Stockholm ; to assert no pretensions on the part of Great Britain which he would not allow to Sweden in the same circumstances, and to impose no duties on Sweden, as a neutral country,

which he would not admit to belong to Great Britain in the same character. If, therefore, I mistake the law in this matter, I mistake that which I consider, and which I mean should be considered, as the universal law upon the question; a question regarding one of the most important rights of belligerent nations relatively to neutrals.

The only special consideration which I shall notice in favour of Great Britain (and which I am entirely desirous of allowing to Sweden in the same or similar circumstances) is, that the nature of the present war does give this country the rights of war, relatively to neutral states, in as large a measure as they have been regularly and legally exercised at any period of modern and civilized times. Whether I estimate the nature of the war justly, I leave to the judgment of Europe, when I declare that I consider this as a war in which neutral states themselves have an interest much more direct and substantial than they have in the ordinary limited and private quarrels (if I may so call them) of Great Britain and its great public enemy. That I have a right to advert to such considerations, provided it be done with sobriety and truth, cannot, I think, reasonably be doubted; and if authority is required, I have authority—and not the less weighty in this question for being Swedish authority—I mean the opinion of that distinguished person, one of the most distinguished which that country (fertile as it has been of eminent men) has ever produced; I mean Baron Puffendorff.¹ The passage to which I allude, is to be found in a note of Barbeyrac's, in his larger work, l. viii. c. 6, s. 8. Puffendorff had been consulted in the beginning of the present century, when England and other states were engaged in the confederacy against Louis XIV., by a lawyer upon the continent, Groningius, who was desirous of supporting the claims of neutral commerce, in a treatise which he was then projecting. Puffendorff concludes his answer to him in these words:—

“I am not surprised that the Northern Powers should consult the general interest of all Europe, without regard to the complaints of some greedy merchants, who care not how things go, provided they can but satisfy their thirst of gain. Those princes wisely judge that it would not become them to take precipitate measures, whilst other nations are combining their whole force to reduce

¹ Puffendorff was not actually born in Sweden, but is usually claimed and allowed as a writer of that country, from his employment in it under the King of Sweden.

The great work on which his fame is principally built, was given to the world during his residence in that country.

within bounds an insolent and exorbitant power, which threatens Europe with slavery and the Protestant religion with destruction. This being the interest of the northern crowns themselves, it is neither just nor necessary that, for the present advantage, they should interrupt so salutary a design, especially as they are at no expense in the affair, and run no hazard." In the opinion, then, of this wise and virtuous Swede, the nature and purpose of a war was not entirely to be omitted in the consideration of the warrantable exercise of its rights, relatively to neutral states. His words are memorable. I do not overrate their importance, when I pronounce them to be well entitled to the attention of his country.

It might likewise be improper for me to pass entirely, without notice, as another preliminary observation (though without meaning to lay any particular stress upon it), that the transaction in question took place in the British Channel, close upon the British coast, a station over which the crown of England has, from pretty remote antiquity, always asserted something of that special jurisdiction which the sovereigns of other countries have claimed and exercised over certain parts of the seas adjoining to their coasts.

In considering the case, I think it will be advisable for me, first, to state the facts as they appear in the evidence; secondly, to lay down the principles of law which apply generally to such a state of facts; thirdly, to examine whether any special circumstances attended the transaction in any part of it, which ought in any manner or degree to affect the application of these principles.

The facts of the capture are to be learnt only from the captors, for, as I have observed, the claimants have been entirely silent about them, and that silence gives the strongest confirmation to the truth of the accounts delivered by the captors.

The attestation of Captain Lawford introduces and verifies his log-book, in which it is stated, that after the meeting of the fleets he sent an officer on board the frigate to inquire about the cargoes and destination of the merchantmen, and was answered "that they were Swedes, bound to different ports in the Mediterranean, laden with hemp, iron, pitch, and tar." Upon doubts which Captain Lawford entertained respecting the conduct he should hold in a situation of some delicacy, he despatched immediately a messenger to the Admiralty, keeping the convoy in his view; and having received orders from the Admiralty by the return of his messenger to detain these merchant-ships, and carry them into the nearest English port, he sent Sir Charles Lindsay and Captain Raper to

communicate them in the civilest terms to the Swedish commodore, who showed his instructions to repel force by force, if any attempt was made to board the convoy, and declared that he should defend them to the last. The crew of the Swedish frigate were immediately at quarters, matches lighted, and every preparation made for an obstinate resistance; and the signal was made on board the British squadron to prepare for battle. In the night, possession was taken of most of the vessels, the Swedish frigate making many movements, which were narrowly watched by 'The Romney,' keeping close under his lee, lower-deck guns run out, and every man at his quarters. In the morning the Swedish frigate hoisted out an armed boat, and sent on board one of the vessels which had been taken possession of, and took out by force the British officer who had been left on board, and carried him on board the frigate, where he was detained. The Swedish commander sent an officer of his own on board Captain Lawford's [ship] to complain that he had taken advantage of the night to get possession of his convoy, which was unobserved by him, or he should assuredly have defended them to the last. Upon further conference and representation of the impracticability of resistance to such a superior force, he at length agreed to go into Margate Roads, and returned the British officer who had been taken out and detained on board the frigate. After the arrival in Margate Roads he lamented that he had not exchanged broadsides; said that he did not consider his convoy as detained, and should resist any further attempt to take possession of them.

Captain Raper states, that on going on board the Swedish frigate, he found all the men at their quarters, and the ship clear for action; that the commodore showed his orders and expressed his firm determination to carry them into execution. Captain Lawford sent a boat with an officer on board several of the convoy, to desire they would follow into Margate Roads; their answer was they would obey no one but their own commodore.

Lieutenant M'Dougal describes in like terms the menacing appearance and motions of the Swedish frigate. He was sent to take possession of vessels which would not bring-to without firing at them. On his going on board one of them, the master declared that he had orders from his commodore not to give up the possession of her to any person whatever, and repeatedly drove away by force the British mariner, who, by his order, took possession of the helm.

Mr. Cockraft is another witness to the same effect, and Mr.

Candish, the officer who was taken by force out of the Swedish merchantman. Expressions of strong reproach against the proceedings of the English were addressed to him, and the commodore protested, that if he had not been surprised he would have defended his convoy to the last.

What then do these attestations (uncontradicted attestations) prove? To my apprehension they prove most clearly these facts: that a large number of vessels, connected all together with each other, and with a frigate which convoyed them, being bound to different ports in the Mediterranean, some declared to be enemy's ports and others not, with cargoes consisting, amongst other things, of naval stores, were met with, close upon the British coast, by his Britannic Majesty's cruisers; that a continued resistance was given by the frigate to the act of boarding any of these vessels by the British cruisers, and that extreme violence was threatened in order to prevent it; and that the violence was prevented from proceeding to extremities only by the superior British force which overawed it; that the act being effected in the night, by the prudence of the British commander, the purpose of hostile resistance, so far from being disavowed, was maintained to the last, and complaint made that it had been eluded by a stratagem of the night; that a forcible recapture of one vessel took place, and a forcible capture and detention of one British officer who was on board her, and who, as I understand the evidence, was not released till the superiority of the British force had awed this Swedish frigate into something of a stipulated submission.

So far go the general facts. But all this, it is said, might be the ignorance or perverseness of the Swedish officer of the frigate—the folly or the fault of the individual alone. This suggestion is contradicted by Mr. Raper's log-book, which proves that the merchantmen refused to admit the British officers on board, and declared that they would obey nobody but their own commodore; a fact to which Mr. M'Dougal likewise bears testimony. It is contradicted still more forcibly by the two sets of instructions, those belonging to the frigate and those belonging to the merchant-vessels. The latter have been brought into Court by themselves, and of the authenticity of the former there is no reasonable doubt; for they are transmitted to me upon the faith of one of the great public offices of the British government, and no person disavows them, and indeed nobody can disavow them, because they were produced by the Swedish captain, who made no secret whatever of their

contents. Something of a complaint has been indulged, that the orders from the British Admiralty have not been produced; a singular complaint, considering that they were never called for by the claimants, and they were not ordered by the Court; because if the act of the captors was illegal, the orders of the Admiralty would not justify it, and the want of orders would not vitiate, if the act was legal. No mystery, however, was made about these, for the communication of orders and instructions was mutual and unreserved. It is said that the instructions to the frigate are intended only against cruisers of Tripoli, and an affidavit has been brought in to show that that government had begun hostilities against the Swedes. The language, however, of these instructions is as universal as language possibly can be; it is pointed against the "fleets of any nation whatever." It is, however, said, that this was merely to avoid giving offence to the Tripoline government. But is the Tripoline government the only government whose delicacy is to be consulted in such matters? Are terms to be used alarming to every other state, merely to save appearances with a government which, they allege in the affidavit referred to, had already engaged in unjust hostility against them? There is, however, no necessity for me to notice this suggestion very particularly, and for this plain reason, that it is merely a suggestion, neither proved nor attempted to be proved in any manner whatever; and the *res gesta* completely proves the fact to be otherwise, because it is clear that if it had been so, the commander of the frigate must have had most explicit instructions to that effect. They could never have put such general instructions on board, meaning that they should be limited in their application to one particular state, without accompanying them with an explanation either verbal or written, which it was impossible for him to misunderstand. Such explanation was the master-key which they must have provided for his private use, whereas nothing can be more certain than that he had been left without any such restrictive instructions; he therefore acts as any other man would do, upon the natural sense and meaning of the only instructions he had received. On this part of the case, therefore, the question is, What is it that these general instructions purport?

The terms of the instructions are these—they are incapable of being misunderstood:—"In case the commander should meet with any ships of war of other nations, one or more of any fleet whatever, then the commander is to treat them with all possible friendship,

and not to give any occasion of enmity; but if you meet with a foreign armed vessel which should be desirous of having further assurance that your frigate belongs to the King of Sweden, then the commander is, by the Swedish flag and salute, to make known that it is so; or if they would make any search amongst the merchant-vessels under your convoy, which ought to be endeavoured to be prevented as much as possible, then the commander is, in case such thing should be insisted upon, and that remonstrances could not be amicably made, and that notwithstanding your amicable comportment the merchant-ships should nevertheless be violently attacked, then violence must be opposed against violence." Removing mere civility of expression, what is the real import of these instructions? Neither more nor less than this, according to my apprehension—"If you meet with the cruisers of the belligerent states, and they express an intention of visiting and searching the merchant-ships, you are to talk them out of their purpose if you can; and if you can't, you are to fight them out of it." That is the plain English, and, I presume, the plain Swedish of the matter.

Were these instructions confined to the frigate, or were they accepted and acted upon by the merchantmen? That they were acted upon is already shown in the affidavits which I have stated; that they were deliberately accepted, appears from their own instructions, which exactly tally with them. These instructions declare in express terms, "that all merchant-ships, during the time they are under convoy of his Majesty's ships, are earnestly forbidden to suffer the boats of any foreign nation to board them for the sake of visitation or searching; but in case such boats show an intention of coming alongside, the merchant-ships are to sheer off from them." It appears from the attestation, that the obedience of these merchantmen outran the letter of their instructions.

Whatever then was done upon this occasion was not done by the unadvised rashness of one individual, but it was an instructed and premeditated act—an act common to all the parties concerned in it; and of which every part belongs to all; and for which all the parties, being associated with one common consent, are legally and equitably answerable.

This being the actual state of the fact, it is proper for me to examine—2ndly, what is their legal state, or, in other words, to what considerations they are justly subject according to the law of nations; for which purpose I state a few principles of that system of law which I take to be incontrovertible.

1st. That the right of visiting and searching merchant-ships upon the high seas, whatever be the ships, whatever be the cargoes, whatever be the destinations, is an incontestible right of the lawfully commissioned cruisers of a belligerent nation. I say be the ships, the cargoes, and the destinations what they may, because till they are visited and searched, it does not appear what the ships, or the cargoes or the destinations are; and it is for the purpose of ascertaining these points that the necessity of this right of visitation and search exists. This right is so clear in principle, that no man can deny it who admits the legality of maritime capture; because if you are not at liberty to ascertain by sufficient inquiry whether there is property that can legally be captured, it is impossible to capture. Even those who contend for the inadmissible rule, that free ships make free goods, must admit the exercise of this right at least for the purpose of ascertaining whether the ships are free ships or not. The right is equally clear in practice; for practice is uniform and universal upon the subject. The many European treaties which refer to this right, refer to it as pre-existing, and merely regulate the exercise of it. All writers upon the law of nations unanimously acknowledge it, without the exception even of Hubner himself, the great champion of neutral privileges. In short, no man in the least degree conversant in subjects of this kind has ever, that I know of, breathed a doubt upon it. The right must unquestionably be exercised with as little of personal harshness and of vexation in the mode as possible; but soften it as much as you can, it is still a right of force, though of lawful force—something in the nature of civil process where force is employed, but a lawful force, which cannot lawfully be resisted. For it is a wild conceit, that wherever force is employed, it may be forcibly resisted; a lawful force cannot lawfully be resisted. The only case where it can be so in matters of this nature, is in the state of war and conflict between two countries, where one party has a perfect right to attack by force, and the other has an equally perfect right to repel by force. But in the relative situation of two countries at peace with each other, no such conflicting rights can possibly co-exist.

2ndly. That the authority of the sovereign of the neutral country being interposed in any manner of mere force cannot legally vary the rights of a lawfully commissioned belligerent cruiser. I say legally, because what may be given, or be fit to be given, in the administration of this species of law, to considera-

tions of comity or of national policy, are views of the matter which, sitting in this Court, I have no right to entertain. All that I assert is, that legally it cannot be maintained, that if a Swedish commissioned cruiser, during the wars of his own country, has a right by the law of nations to visit and examine neutral ships, the King of England, being neutral to Sweden, is authorized by that law to obstruct the exercise of that right with respect to the merchant-ships of his country. I add this, that I cannot but think that if he obstructed it by force, it would very much resemble (with all due reverence be it spoken) an opposition of illegal violence to legal right. Two sovereigns may unquestionably agree, if they think fit (as in some late instances they have agreed¹) by special covenant, that the presence of one of their armed ships along with their merchant-ships shall be mutually understood to imply that nothing is to be found in that convoy of merchant-ships inconsistent with amity or neutrality; and if they consent to accept this pledge, no third party has a right to quarrel with it any more than with any other pledge which they may agree mutually to accept. But surely no sovereign can legally compel the acceptance of such a security by mere force. The only security known to the law of nations upon this subject, independent of all special covenant, is the right of personal visitation and search, to be exercised by those who have the interest in making it. I am not ignorant, that amongst the loose doctrines which modern fancy, under the various denominations of philosophy and philanthropy, and I know not what, have thrown upon the world, it has been within these few years advanced, or rather insinuated, that it might possibly be well if such a security were accepted. Upon such unauthorized speculations it is not necessary for me to descant. The law and practice of nations (I include particularly the practice of Sweden when it happens to be belligerent) give them no sort of countenance; and until that law and practice are new-modelled in such a way as may surrender the known and ancient rights of some nations to the present convenience of other nations (which nations may perhaps remember to forget them when they happen to be themselves belligerent), no reverence is due to them; they are the elements of that system which, if it is consistent, has for its real purpose an entire abolition of capture in war—that is, in other words, to change the nature of hostilities, as it has ever existed

¹ It is made an article of treaty between America and Holland, an. 1782, Art. 10, Mart. Tr. vol. ii. p. 255.

among mankind, and to introduce a state of things not yet seen in the world, that of a military war and a commercial peace. If it were fit that such a state should be introduced, it is at least necessary that it should be introduced in an avowed and intelligible manner, and not in a way which, professing gravely to adhere to that system which has for centuries prevailed among civilized states, and urging at the same time a pretension utterly inconsistent with all its known principles, delivers over the whole matter at once to eternal controversy and conflict, at the expense of the constant hazard of the harmony of states, and of the lives and safeties of innocent individuals.

3rdly. That the penalty for the violent contravention of this right is the confiscation of the property so withheld from visitation and search. For the proof of this I need only refer to Vattel, one of the most correct, and certainly not the least indulgent of modern professors of public law. In Book III., ch. vii. § 114, he expresses himself thus:—"On ne peut empêcher le transport des effets de contrebande, si l'on ne visite pas les vaisseaux neutres que l'on rencontre en mer; on est donc en droit de les visiter. Quelques nations puissantes ont refusé en différent temps de se soumettre à cette visite; aujourd'hui un vaisseau neutre, qui refuseroit de souffrir la visite, se feroit condamner par cela seul, comme étant de bonne prise." Vattel is here to be considered not as a lawyer merely delivering an opinion, but as a witness asserting the fact—the fact that such is the existing practice of modern Europe. And to be sure the only marvel in the case is, that he should mention it as a law merely modern, when it is remembered that it is a principle, not only of the civil law (on which great part of the law of nations is founded), but of the private jurisprudence of most countries in Europe, that a contumacious refusal to submit to fair inquiry infers all the penalties of convicted guilt. Conformably to this principle we find in the celebrated French Ordinance of 1681, now in force, Article 12, "That every vessel shall be good prize in case of resistance and combat." And Valin, in his smaller Commentary, p. 81, says expressly that, although the expression is in the conjunctive, yet the resistance alone is sufficient.¹ He refers to the Spanish Ordinance, 1718, evidently copied from it, in which it is expressed in the disjunctive, "in case of resistance *or*

¹ In some of the treaties of France this Article is expressly inserted in the disjunctive. Treaty between France and

the Duchy of Mecklenburg, Art. 18, an. 1779, Mart. Tr. vol. ii. p. 40 Also between France and Hamburg, an. 1769.

combat." And recent instances are at hand and within view, in which it appears that Spain continues to act upon this principle. The first time in which it occurs to my notice on the inquiries I have been able to make in the Institutes of our own country respecting matters of this nature, excepting what occurs in the Black Book of the Admiralty,¹ is in the Order of Council, 1664, Article 12,² which directs, "That when any ship, met withal by the

¹ "B. 7. Item se aucune nef ou vessel de la ditte flotte a congie et pouvoir de l'admiral de passer hors de la flotte entour aucun message ou autre besongne, s'ilz encontrement ou trouvent aucuns vesseaulx estranges sur la mer ou en ports des ennemys, adonques ceulx de nostre flotte doivent demander des maistres et gouverneurs de telz vesseaulx estrangers dont ilz sont et eulx bien examiner de leur charge ensemblement avecques leurs muniments et endentures, et s'il est trouve aucune chose de suspicion en telz vesseaulx que les biens sont aux ennemys, qui sont trouvez dedens les dits vesseaulx avec leur maistres et gouverneurs ensemblement avecque les biens dedens icelle estants saurement seront amenees devant, l'admiral, et illecques s'il est trouve qu'ilz sont loysaulz marchants et amys sans suspicion de colerer, les biens seront a eulz redelivrees sans eulz rien dommager, autrement seront pris avec leurs biens et raensonnez comme la loy de mer veult et demande.

"B. 8. Se aucunes de noz nefes ou vesseaulx encontrement sur la mer ou en ports aucuns autres vesseaulz, qui facent rebelletees ou defense encontre ceulz de noz nefes ou vesseaulz, adonques bien life a noz gents les autres comme ennemys assailir et par forte mayn les prendre et amener entierement, comme ilz les ont gaignez, devant l'admiral sans eulz piller ou endommager, illecques de prendre ce que loy et coustume de mer veult et demande, etc."

² During the struggle for naval superiority, which took place between the maritime states of Europe, about the middle of the seventeenth century, the pretension of resisting search by protec-

tion of convoy was put forward with much caution, and apparently for the first time, by Christina, Queen of Sweden, August, 1653, Art. 4:—"They shall in all possible ways decline that they, or any of those that belong to them, be searched. For seeing they are only sent to prevent all inconvenience and clandestine dealings, it is expected that they may be believed, and suffered to pass and proceed on their course unmolested, with all such things as are under their care." It was restrained to neutral ports, Art. 6. "And more especially, for certain reasons, it is our command, that our men-of-war do chiefly, and in the beginning, steer their course to such ports as are neutral in the English and Dutch war, till we give any further directions on that account. However, without any hindrance to our own subjects, that intend to carry on their own free trade to England and Holland without convoy." Thurloe's St. Papers, vol. i. p. 424.

In 1655 it was taken up by Holland:—"They have a design to hinder the Protector all visitation and search; and this by very strong and sufficient convoy; and by this means they will draw all trade to themselves and their ships." *Ib.* vol. iv. p. 203.

In May, 1656, there happened an actual encounter on this subject between a fleet of merchantmen from Cadiz (Spain being then at war with England) under the convoy of De Ruyter, with seven men-of-war and the commodore of some English frigates. "Antwerp. We have certain news of the arrival of De Ruyter in Zealand from Cadiz, from whence he brought stores of plate mostly belonging to merchants in this city; he was met

Royal Navy or other ship commissioned, shall fight or make resistance, the said ship and goods shall be adjudged lawful prize." A similar article occurs in the proclamation of 1672. I am aware that in those orders and proclamations are to be found some articles not very consistent with the law of nations as understood now, or indeed at that time, for they are expressly censured by Lord

withal at sea by some English frigates, but finding themselves too weak they let him go." *Ib.* vol. iv. p. 740. See also the particular account of what passed, given by a Dutch officer to the States-General:—"That upon De Ruyter declaring that there was not anything on board belonging to the King of Spain, they parted." *Ib.* vol. iv. p. 730. It appears, however, that the arrival occasioned great triumph in Holland and Flanders, and that the fleet was deeply laden with silver for the King of Spain and the service of his armies in Flanders. "De Ruyter brought in his own ship and others in his fleet the sum of 20,000,000 (perhaps rials) of gold and silver, the greatest part for the King of Spain's use and the merchants of Brabant and Flanders." *Ib.* vol. iv. p. 748, 732. The 12th Article of the Eng. Ord. of 1664 might, perhaps, be pointed against these pretensions.

In another letter in the same collection, 21st September, 1657, from Nieupoort, the Dutch ambassador in England, we find the subject of convoy was strongly pressed at the time, and resisted on the part of this country:—"Respecting secret articles concerning the visitation of ships which are convoyed under the flag of the state, I acquainted their lordships that of old all kings and states had made a difference between particular ships sailing upon their risques and adventures and between ships of the state and those which pass the sea under their flag and protection. That their high and mighty lords were of an opinion that it does strengthen the security of this state, that the ships of the state and officers should be responsible, as it were, for the ships sailing under their convoy; and that

which I had proposed in my last memorandum concerning the same on behalf of their high and mighty lords was no new thing, but that plan had been most commonly proposed in all the treaties since the year 1651, in that manner that without regulating the same according to the said articles, the troubles at sea, whereof I had so often complained, could not be removed and prevented, and I alleged several examples. Upon which, now one, then the other, of the said three lords (Thurloe, Wolsely, Jones) replied, and did very much insist, that it could not consist with their security; that they could not nor *ought* to trust so much to particular captains at sea; that it would be an introduction and encouragement to disaffected persons to assist the enemy, and urged especially that in no former treaties any such articles were found, and that their high and mighty lords had no reason to desire now any such novelty. I said that the practice on this side in regard of searching and visiting ships without difference was a new thing, and that the inhabitants of the United Netherlands, feeling the trouble and inconvenience of it, had reason to insist that it may be rectified by a good regulation." Vol. vi. p. 511. See also, for the former conference, vol. v. p. 663.

It appears that so many objections had arisen on the treaty proposed on the part of Holland, that it was found necessary to form an entirely new *projet*. Vol. vi. p. 523-558.

In a subsequent letter from the Hague, 30th Nov. 1657, it appears that the treaty broke off on this difference:—"Le Sieur Nieupoort n'est pas encore ici arrivé, mais il escrit aussi d'avoir prins son congé. Il est fort croyable qu'il ne sera guère con-

Clarendon.¹ But the article I refer to is not of those he reprehends, and it is observable that Sir Robert Wiseman, then the King's Advocate-General, who reported upon the articles in 1673, and expresses a disapprobation of some of them as harsh and novel, does not mark this article with any observation of censure. I am, therefore, warranted in saying that it was the rule, and the undisputed rule, of the British Admiralty. I will not say that that rule may not have been broken in upon in some instances by considerations of comity or of policy, by which it may be fit that the administration of this species of law should be tempered in the hands of those tribunals which have a right to entertain and apply them; for no man can deny that a state may recede from its extreme rights, and that its supreme councils are authorized to determine in what cases it may be fit to do so, the particular captor having in no case any other right and title than what the state itself would possess under the same facts of capture. But I stand with confidence upon all fair principles of reason—upon the distinct authority of Vattel—upon the Institutes of other great maritime countries, as well as those of our own country, when I venture to lay it down, that by the law of nations, as now understood, a deliberate and continued resistance to search, on the part of a neutral vessel to a lawful cruiser, is followed by the legal consequence of confiscation.

3. The third proposed inquiry was, whether any special circumstances preceded, accompanied, or followed the transaction, which ought in any manner or degree to affect the application of the general principles?

The first ground of exemption stated on the part of the claim-

tent d'avoir faillé à achever le traitee de la marine; neanmoins, je m'imagine que la Hollande à present ne seroit pas fort marry de n' l'avoir pas achevé, pour ne se pas oster la liberté de visiter des mêmes en cette guerre contre Portugal." Thurloe's State Pap. vol. vi. p. 622.

On the subject of search generally, without any *expressed reference* to convoy, there is this letter from Cromwell to General Montagu:—

"The secretary hath communicated to us your letter of the 28th, by which you acquaint him with the directions you have given for the searching of a Flush-

ing and other Dutch ships, which (as you are informed) have bullion and other goods aboard them belonging to the Spaniard, the declared enemy of this state. There is no question to be made but what you have directed therein is agreeable both to the laws of nations and the particular treaties which are between this Commonwealth and the United Provinces, and therefore we desire you to continue the said direction, and to require the captains to be careful in doing their duty therein.

"*Hampton Court, 30th August, 1657.*"

¹ Lord Clarendon's Life, p. 242.

ants, is the treaty with Sweden, 1661, Article 12, and it was insisted by Dr. *Lawrence*, that although the belligerent country is authorized by the treaty to exercise rights of inquiry in the first instance, yet that these rights were not exercised in the manner therein prescribed. It is an obvious answer to that observation, that this treaty never had in its contemplation the extraordinary case of an armed vessel sent in company with merchantmen for the very purpose of beating off all inquiry and search. On the contrary, it supposes an inquiry for certain papers, and if they are not exhibited, or "there is any other just and strong cause of suspicion," then the ship is to undergo search.¹ The treaty, therefore, recognizes the rights of inquiry and search, and the violation of those rights is not less a violation of the treaty than it is of the general law of nations. It is said that the demand ought first to have been made upon the frigate. I know of no other rule but that of mere courtesy which requires this; for this extraordinary case of an armed ship travelling along with merchant-ships, is not a *casus fœderis* that is at all so provided for in the treaty; however, if it is a rule, it was complied with in the present instance, and the answer returned was, that "they were Swedish ships bound to various ports in the Mediterranean, laden with iron, hemp, pitch, and tar." The question then comes, what rights accrued upon the receipt of this answer? I say, first, that a right accrued of send-

¹ It is said by Secretary *Thurloe*, in his conference with the Dutch ambassador, December, 1656, "that the point of passes was very considerable to the State, and that the same was never agreed to in any treaty with any nation, but lately to Sweden." *Thurl. St. P.* vol. v. p. 663.

A reference to the certificate of foreign magistrates, with a primary but inconclusive credit ascribed to them, appears to have been established in Denmark by *Frederic II.* in 1583, as a custom-house regulation respecting the customs and Sound duties payable by foreign merchants. Speaking of abuses, "we not minding any longer to suffer the same, do therefore will that henceforth every man which uses his trade of merchandise and navigation through our custom, towns, and streams, do cause a certain and just brief of all the laden mer-

chandises and goods to be comprehended in the certificates which he is to take under the seal of *his magistrate, and deliver* the same to our customers, with this warning, that if any man arrive there without such true and just certificate, and any hindrance and inconvenience do happen unto him in that respect, the ship being searched, that then he impute the same unto himself, and not unto us or ours; and if *upon cause of suspicion the ships should be searched*, notwithstanding that a particular certificate had been delivered; and that in them more merchants' goods should be found than were comprehended in the certificates which were brought in, then not only those goods, but the whole ship and goods, as being forfeited, shall be confiscated and seized upon." *Promulged*, 1583. *Rym. Fœd.* vol. xvi. p. 347, 352.

ing on board each particular ship for their several papers; for each particular ship, without doubt, had its own papers; the frigate could not have them; and the captors had a right to send on board them to demand those papers, as well under the treaty as under the general law. A second right that accrued upon the receiving of this answer was, a right of detaining such vessels as were carrying cargoes so composed, either wholly or in part, to any ports of the enemies of this country; for that tar, pitch, and hemp, going to the enemy's use, are liable to be seized as contraband in their own nature, cannot, I conceive, be doubted under the modern law of nations; though formerly, when the hostilities of Europe were less naval than they have since become, they were of a disputable nature, and perhaps continued so at the time of making that treaty, or at least at the time of making that treaty which is the basis of it. I mean the treaty in which Whitlock was employed in the year 1656; for I conceive that Valin expresses the truth of this matter when he says, p. 68, "*De droit ces choses*" (speaking of naval stores) "*sont de contrabande aujourd'hui et depuis le commencement de ce siècle, ce qui n'étoit pas autrefois néanmoins*"; and Vattel, the best recent writer upon these matters, explicitly admits, amongst positive contraband "*les bois et tout ce qui sert à la construction et à l'armement de vaisseaux de guerre.*" Upon this principle was founded the modern explanatory article of the Danish treaty, entered into in 1780, on the part of Great Britain, by a noble lord (the late Earl of Mansfield), then Secretary of State, whose attention had been peculiarly turned to subjects of this nature. I am therefore of opinion that, although it might be shown that the nature of these commodities had been subject to some controversy in the time of Whitlock, when the fundamental treaty was constructed, and that therefore a discreet silence was observed respecting them in the composition of that treaty and of the latter treaty derived from it, yet that the exposition which the later judgment and practice of Europe has given upon this subject would, in some degree, affect and apply what the treaties had been content to leave on that indefinite and disputable footing on which the notions then more generally prevailing in Europe had placed it. Certain it is, that in the year 1750, the Lords of Appeal in this country declared pitch and tar, the produce of Sweden and on board a Swedish ship bound to a French port, to be contraband and subject to confiscation, in the memorable case of the *Med Good's Hjelpe* (Lords, 1750). In the more modern understanding of this matter,

goods of this nature, being the produce of Sweden, and the actual property of Swedes and conveyed by their own navigation, have been deemed in British Courts of Admiralty, upon a principle of indulgence to the native products and ordinary commerce of that country, subject only to the milder rights of preoccupancy and preemption; or to the rights of preventing the goods from being carried to the enemy, and of applying them to your own use, making a just pecuniary compensation for them. But to these rights, being bound to an enemy's port, they are clearly subject, and may be detained without any violation of national or individual justice. Thirdly, another right accrued, that of bringing in for a more deliberate inquiry than could possibly have been conducted at sea, upon such a number of vessels, even those which professed to carry cargoes with a neutral destination. Was there or was there not the just and grave suspicion, which the treaty refers to, excited by the circumstances of such number of vessels with such cargoes intended to sail all along the extended coasts of the several public enemies of this kingdom, under the protection of an armed frigate associated with them for the very purpose of beating off by force all particular inquiry? But supposing even that there was not, is this the manner in which the observance of the treaty or of the law of nations is to be enforced? Certainly not by the treaty itself; for the remedy for infraction is provided in compensations to be levied and punishments to be inflicted upon delinquents by their own respective sovereigns. Article 12. How stands it by the general law? I don't say that cases may not occur in which a ship may be authorized by the natural rights of self-preservation to defend itself against extreme violence threatened by a cruiser grossly abusing his commission; but where the utmost injury threatened is the being carried in for inquiry into the nearest port, subject to a full responsibility in costs and damages if this is done vexatiously and without just cause, a merchant-vessel has not a right to say for itself (and an armed vessel has not a right to say for it), "I will submit to no such inquiry, but I will take the law into my own hands by force." What is to be the issue, if each neutral vessel has a right to judge for itself in the first instance whether it is rightly detained, and to act upon that judgment to the extent of using force? Surely nothing but battle and bloodshed, as often as there is anything like an equality of force or an equality of spirit. For how often will the case occur in which a neutral vessel will judge itself to be rightly detained? How far

the peace of the world will be benefited by taking the matter from off its present footing and putting it upon this, is for the advocates of such a measure to explain. I take the rule of law to be, that the vessel shall submit to the inquiry proposed, looking with confidence to those tribunals whose noblest office (and I hope not the least acceptable to them) is to relieve, by compensation, inconveniences of this kind where they have happened through accident or error; and to redress by compensation and punishment, injuries that have been committed by design.

The second special ground taken on the part of the claimant, was, that the intention was never carried into act. And I agree with Dr. *Lawrence*, that if the intention was voluntarily and clearly abandoned, an intention so abandoned, or even a slight hesitation about it, would not constitute a violation of right. But how stands the fact in the present case? The intention gives way, so far as it does give way, only to a superior force. It is for those who give such instructions to recollect that the averment of an abandonment of intention cannot possibly be set up, because the instructions are delivered to persons who are bound to obey them, and who have no authority to vary. The intention is necessarily unchangeable; and being so, I do not see the person who could fairly contradict me, if I was to assert that the delivery and acceptance of such instructions and the sailing under them, were sufficient to complete the act of hostility. However that might be, the present fact is, that the commander sails with instructions to prevent inquiry and search by force, which instructions he is bound to obey, and which he is prevented from acting upon to their utmost extent only by an irresistible force. Under such circumstances how does the presumption of abandonment arise? If it does, mark the consequences. If he meets with a superior force, he abandons his hostile purpose. If he meets with an inferior force, he carries it into complete effect. How much is this short of the ordinary state of actual hostility? What is hostility? It is violence where you can use violence with success; and where you cannot, it is submission and striking your colours. Nothing can be more clear, upon the perusal of these attestations, than that this gentleman abandoned his purpose merely as a subdued person in an unequal contest. The resistance is carried on as far as it can be; and when it can maintain itself no longer, *fugit indignata*.

3. It is said that the papers were not immediately taken possession of nor proceedings instituted till long after the arrival in

port. These are unquestionably irregularities, but I agree with the King's Advocate in maintaining that they are not such irregularities as will destroy the captor's right of proceeding, for the claimant had his remedy in the way of a monition. How these delays were occasioned, whether in consequence of pending negotiations (as has been repeatedly asserted in the course of the argument), I am not judicially informed. If such negotiations ever existed, I may have reason personally to lament that they have proved ineffectual. But the legal consequence of that inefficiency undoubtedly is, that the question of law remains the same as if no such negotiation had ever been thought of.

4. It is lastly said, that they have proceeded only against the merchant-vessels, and not against the frigate, the principal wrong-doer. On what grounds this was done—whether on that sort of comity and respect which is not unusually shown to the immediate property of great and august sovereigns, or how otherwise—I am, again, not judicially informed; but it can be no legal bar to the right of a plaintiff to proceed, that he has for some reason or other declined to proceed against another party against whom he had an equal or possibly a superior title. And as to the particular case of one vessel which had obtained her release and a redelivery of her papers, the act of the captors may, perhaps, furnish a reasonable ground of distinction with respect to her own special case; but its effect, be it what it may, is confined to herself, and can be extended no further.

I am of opinion, therefore, that special circumstances do not exist which can take the case out of the rule which is generally applicable to such a state of facts; and I have already stated that rule to be the confiscation of all the property forcibly withheld from inquiry and search. It may be fitting (for anything that I know), that other considerations should be interposed to soften the severity of the rule, if the rule can be justly taxed with severity; but I have neither the knowledge of any such considerations, nor authority to apply them. If any negotiations have pledged (as has been intimated) the honour and good faith of the country, I can only say that it has been much the habit of this country to redeem pledges of so sacred a nature. But my business is merely to decide whether, in a Court of the law of nations, a pretension can be legally maintained which has for its purpose neither more nor less than to extinguish the right of maritime capture in war; and to do this, how? by the direct use of hostile force on the part of

a neutral state. It is high time that the legal merit of such a pretension should be disposed of one way or other—it has been for some few years past preparing in Europe—it is extremely fit that it should be brought to the test of a judicial decision; for a worse state of things cannot exist, than that of an undetermined conflict between the ancient law of nations, as understood and practised for centuries by civilized nations, and a modern project of innovation utterly inconsistent with it; and, in my apprehension, not more inconsistent with it than with the amity of neighbouring states and the personal safety of their respective subjects.

The only remaining question which I have to consider is, the matter of expenses; and this I think myself bound to dispose of with as much tenderness as I can use in favour of individuals. It is to be observed that the question itself was of an importance and delicacy somewhat beyond the powers of decision belonging to such person. The authority of their country has been in some degree surprised in this matter. The captors have been extremely tardy in proceeding to adjudication. Attending to all these considerations, I think the claimants are clearly entitled to have their expenses charged upon the value of the property up to the time of the order for further proof. From that time the property might have been withdrawn upon bail, and it is no answer in the Court to say that this gentleman or another gentleman did not think it advisable to commit their private fortunes to the extent of the security required. It is the business of foreign owners who have brought their ships and cargoes into such situations of difficulty, to find the means of relieving them when the opportunity can be used. I go sufficient lengths in allowing expenses for the further time in which orders could have been obtained from Sweden, and I fix this at the distance of two months from the order of further proof; and, condemning the ship and cargo, I direct all private adventures to be restored.

This is the substance of what I have to pronounce judicially in this case, after weighing with the most anxious care the several facts and the learned arguments which have been applied to them. I deliver it to my country, and to foreign countries, with little diffidence in the rectitude of the judgment itself; I have still more satisfaction in feeling an entire confidence in the rectitude of the considerations under which it has been formed.

"The international law on the subject of the right of visitation and search," says Wheaton, "is ably summed up by Sir *William Scott* in the case of *The Maria*, where the exercise of that right was attempted to be resisted by the interposition of a convoy of Swedish ships of war." Wheaton's *Elements of International Law*, p. 588. The judgment of Sir *William Scott* was attacked by Professor J. F. W. Schlegel, of Copenhagen, in a 'Treatise on the Visitation of Neutral Ships under Convoy' (trans. Lond. 1801), and vindicated by Dr. Croke in 'Remarks on M. Schlegel's Work,' 1801. The learned judge, in the above-mentioned case lays down certain principles upon this subject which he took to be incontrovertible. 1st. That the right of visiting and searching *merchant-ships* upon the high seas, whatever be the ships, whatever be the cargoes, whatever be the destination, is an incontestable right of the lawfully commissioned cruisers of a belligerent nation. "I say," he adds, "be the ships, the cargoes, and the destination what they may, because, till they are visited and searched, it does not appear what the ships, the cargoes, or the destinations are; and it is for the purpose of ascertaining these points that the necessity of this right of visitation and search exists. This right is so clear in principle, that no man can deny it who admits the legality of maritime capture; because if you are not at liberty to ascertain, by sufficient inquiry, whether there is

property that can be legally captured, it is impossible to capture. Even those who contend for the inadmissible rule, that free ships make free goods, must admit the exercise of this right, at least for the purpose of ascertaining whether the ships are free ships or not." *Ante*, p. 655, 656.

To illustrate these observations, we may remark, that if the right to search merchant-ships were not permitted, in the case of hostile ships they might escape capture by assuming the character of neutrals, which it would be impossible to detect without a close inspection. So likewise in the case of neutral vessels, they might either contain enemy's goods, which according to the general international law it is allowable to capture, or they might contain contraband of war, the nature of which could only be ascertained by an examination of the cargo and finding out the destination of the ship. Moreover, it would in many cases be impossible to say whether a vessel was or was not guilty of a breach of blockade, unless it were visited and searched, in order to determine from what port it had come or for what port it was bound. "The right of search," says Sir *William Scott*, "is equally clear in practice; for practice is uniform and universal upon the subject. The many European treaties which refer to this right, refer to it as pre-existing, and merely regulate the exercise of it. All writers upon the law of nations unanimously acknowledge it, without the

exception even of Hubner himself, the great champion of neutral privileges." *Ante*, p. 656.

The right of search being lawful, it follows, as laid down secondly in the principal case, "that the authority of the sovereign of a neutral country being interposed in any manner of mere force cannot *legally* vary the rights of a lawfully commissioned belligerent cruiser." Hence it was there decided that Swedish merchantmen in time of *war* might be legally visited and searched by British cruisers, although under convoy of a Swedish ship of war, and that by resistance on the part of the convoying ship, the whole of the merchantmen were liable to confiscation. See also *The Elise*, 4 C. Rob. 408.

Two sovereigns, however, may, as is laid down in the principal case, unquestionably agree, if they think fit (as in some instances they have agreed) by special covenant, that the presence of one of their armed ships along with their merchant-ships shall be mutually understood to imply that nothing is to be found in that convoy of merchant-ships inconsistent with amity or neutrality; and if they consent to accept this pledge, no third party has a right to quarrel with it any more than with any other pledge which they may agree mutually to accept. But surely no sovereign can legally compel the acceptance of such a security by mere force. The only security known to the law of nations upon this subject, independent of all special covenants, is the right of

personal visitation and search, to be exercised by those who have the interest in making it. *Ante*, p. 657.

The right of visitation and search is a purely *belligerent* claim, and can only be exercised in time of war; it does not exist in time of peace, because it has not then the same foundation on which alone it is tolerated in war—the necessities of self-defence. See the *Le Louis*, 2 Dods. 210, 245, where the sentence of a Vice-Admiralty Court, condemning a French ship for being employed in the slave-trade, and forcibly resisting the search of the king's cruisers in *time of peace*, was reversed.

Hence a nation has no right, in the absence of treaty, to visit and search in time of peace all the apparent vessels of other countries on the high seas, in order to institute an inquiry, whether they are not in truth its own vessels violating its own laws. No such right has ever been claimed; nor can it be exercised without the oppression of interrupting and harassing the real and lawful navigation of other countries. *Ib.* 258.

The right to visit and search vessels suspected of being engaged in the slave-trade, has given rise to much discussion, especially between England and the United States, but the doctrine laid down in the case of *Le Louis*, upon which it seems strange that any doubt could possibly be thrown, must now be considered as an accurate exposition of international law upon this subject. Hence it

is clear that *in the absence of treaty* neither Great Britain nor any other country employing cruisers for the suppression of the slave-trade has any right, in time of peace, to visit and search vessels sailing under the flag of another country. See this subject discussed at some length, and from an American point of view, in Lawrence's 'Right of Visitation and Search.'

Maritime states, however, have claimed a right of visitation and inquiry within those parts of the ocean adjoining to their own shores, which the common courtesy of nations has for their common convenience allowed to be considered as parts of their dominions for various domestic purposes, and particularly for fiscal or defensive regulations more immediately affecting their safety and welfare. Such are the hovering laws (9 Geo. II. c. 85), which, within certain limited distances more or less moderately assigned, subject foreign vessels to such examination. This, however, has nothing in common with a right of visitation and search upon the unappropriated parts of the ocean. The *Le Louis, Forest*, 2 Dods. 245.

The penalty for the violent contravention of the right of search is the confiscation of the property so withheld from visitation and search. See *ante*, p. 658, where the authorities on the subject are cited and discussed.

The resistance, however, of an *enemy* merchant-vessel will not, in general, be a sufficient cause for

confiscating any neutral property on board, for resistance in such a case on the part of an enemy is a lawful and justifiable act, which on the part of a neutral would be considered both unjustifiable and contrary, as we have seen, to the general principles of international law. "If," says Sir *W. Scott*, "a *neutral* master attempts a rescue, or to withdraw himself from search, he violates a duty which is imposed upon him by the law of nations, to submit to come in for inquiry as to the property of the ship or cargo; and if he violates that obligation by a recurrence to force, the consequence will undoubtedly reach the property of his owner; and it would, I think, extend also to the confiscation of the whole cargo entrusted to his care, and thus fraudulently attempted to be withdrawn from the rights of war. With an *enemy* master, the case is very different: no duty is violated by such an act on his part—*lupum auribus teneo*, and if he can withdraw himself, he has a right so to do." *The Catherina Elizabeth*, 5 C. Rob. 232.

But if a neutral put goods on board a belligerent armed ship, they will, according to the law as laid down by Sir *William Scott*, be subject to confiscation on the capture of the vessel. For in such a case the owner of the goods has every reason to presume that the vessel will be defended against the enemy by force. The owner of the goods, therefore, betrays an intention to resist visitation and search, which he would not do by

putting them on board a mere merchant-vessel, and so far as he does this he adheres to the belligerent; he withdraws himself from his protection of neutrality, and resorts to another mode of defence; it is quite clear, therefore, that if a party act in association with a hostile force, and relies upon that force for protection, he is *pro hac vice* to be considered as an enemy. *The Fanny*, *Lawton*, 1 Dods. 448. See, however, *The Nereide*, 9 Cranch, 388.

Upon the same principle it follows that neutral vessels sailing under enemy's convoy are liable to capture. *The Sampson*, *Barney*, ante, p. 646, cited; Manning's Commentaries on the Law of Nations, pp. 369, 370; but see Wheat. Internat. Law, 594, 6th ed.

"The judgment of condemnation pronounced in the case of *The Maria*," says Wheaton, "was followed by the treaty of armed neutrality entered into by the Baltic powers in 1800, which league was dissolved by the death of the Emperor Paul, and the points in controversy between those powers and Great Britain were finally adjusted by the convention of 5th June, 1801. By the 4th Article of this convention, the right of search as to merchant-vessels sailing under neutral convoy was modified, by limiting it to *public* ships of war of the belligerent party, *excluding* private armed vessels. Subject to this modification, the pretension of resisting by means of convoy the exercise of the belligerent right of search was surrendered by Russia

and the other northern powers, and various regulations provided to prevent the abuse of that right to the injury of neutral commerce." Wheat. Internat. Law, 590.

On strict principle, to defeat the right of search by evasion, might be as penal as to resist it by force, though it has not been so held in practice; but certainly it is conduct which is always to be viewed with jealousy, and cannot be set up as an excuse advantageous to the parties, in any matter requiring explanation of their conduct. *The Mentor*, *Williams*, Edw. 208. A mere attempt to escape, before any possession assumed, has never, it seems, been held to draw with it the consequences of condemnation. *The St. Juan Baptista* and *La Purissima Concepcion*, 5 C. Rob. 35.

A vessel will not be liable to confiscation for resisting search, if she was not aware of a war having broken out. Thus, where some Spanish ships who had left port before they were aware that a war had broken out between Great Britain and France and Holland, were detained by a British cruiser on the ground of having resisted the exercise of visitation and search, it was held by Sir *William Scott* that the ships ought to be restored. "Among the facts," observed the learned Judge, "necessary to bring the case within the operation of the law, it must be shown, in the first instance, that the vessel had reasonable grounds to be satisfied of the existence of

a war; otherwise there is no such thing as neutral character, nor any foundation for the several duties which the law of nations imposes on that character. It is, therefore, a very material circumstance in this case, that at the time of sailing no war was supposed to exist in the knowledge or contemplation of those who commanded these vessels. They

sailed in perfect ignorance of war, and consequently unconscious that they had any neutral duties to perform." *The St. Juan Baptista* and *La Purissima Concepcion*, 5 C. Rob. 33.

The right of search does not extend to ships of war belonging to neutral states. See Manning's *Commentaries of the Law of Nations*, 370-376.

THE HOOP, CORNELIS, MASTER.

Feb. 13th, 1799, High Court of Admiralty.

[REPORTED 1 C. ROB. 196.]

TRADE WITH THE ENEMY—LICENSES.]—*British merchants are not at liberty to trade with the enemy without the King's license; all property taken in such a trade, is confiscable as prize to the captor.*

This was a case of a claim of several British merchants for goods purchased on their account in Holland, and shipped on board a neutral vessel.

The affidavit annexed to the claim set forth:—That Mr. Malcolm, of Glasgow, and several other merchants of North Britain, had, long prior to hostilities, been used to trade extensively with Holland, in the importation of various articles of the produce of Holland, which were particularly wanted for the use of Glasgow, and essentially necessary to the agriculture and manufacture of that part of the kingdom; and that, after the irruption of the French into Holland, they had constantly applied for, and obtained special orders of his Majesty in council, permitting them to continue that trade; that after the passing of the Acts of Parliament 35 Geo. III. c. 15¹ and 80; 36 Geo. III. c. 76; 37 Geo. III. c. 12, confirming and continuing the orders in council of the 16th and 21st January, it was apprehended in that part of Great Britain that by these Acts the importation of such goods was made legal.

¹ The 35 Geo. III. c. 15 (16 March, 1795), reciting and confirming the orders of council of the 16th and 21st January (which allowed goods coming to ports of this kingdom directly from any port of Holland, and navigated in any manner, to be landed and secured in warehouses for the use of the proprietors till further orders), enacts, that it shall be lawful to

import such goods belonging to subjects of the United Provinces, or to any subject of his Majesty, to be landed and secured in warehouses for the benefit of the proprietor, and for the security of the revenue. The subsequent Acts contain further regulations for property coming from Holland, in the ambiguous situation of the two countries at that time.

But for the greater security they still made application to *the Commissioners of Customs at Glasgow*, to know what they considered to be the interpretation of the said Acts, and whether his Majesty's license was still necessary; and that in answer to such application, the merchants were informed, under the opinion of the law advisers of the said Commissioners, that no such orders of council were necessary, and that all goods brought from the United Provinces would in future be entered without them; and that in consequence of such information, they had caused the goods in question to be shipped at Rotterdam for their account; ostensibly documented for Bergen to avoid the enemy's cruisers.

JUDGMENT.

SIR W. SCOTT.—This is the case of a ship laden with flax, madder, geneva, and cheese, and bound from Rotterdam ostensibly to Bergen; but she was in truth coming to a British port, and took a destination to Bergen to deceive French cruisers; and as the claim discloses (of which I see no reason to doubt the truth) the goods were to be imported on account of British merchants, being most of them articles of considerable use in the manufactures and commerce of this country, and being brought under an assurance from the Commissioners of the Customs in Scotland, that they might be lawfully imported without any license, by virtue of the statute 35 Geo. III. cc. 15 and 80.

It is said that these circumstances compose a case entitled to great indulgence; and I do not deny it. But if there is a rule of law on the subject binding the Court, I must follow where that rule leads me; though it leads to consequences which I may privately regret, when I look to the particular intentions of the parties.

In my opinion there exists such a general rule in the maritime jurisprudence of this country, by which all trading with the public enemy, unless with the permission of the sovereign, is interdicted. It is not a principle peculiar to the maritime law of this country; it is laid down by Bynkershoek as an universal principle of law—*Ex natura belli commercia inter hostes cessare non est dubitandum. Quam vis nulla specialis sit, commerciorum prohibitio, ipso tamen jure belli commercia esse vetita, ipsæ indictiones bellorum satis declarant, etc.* He proceeds to observe, that the interests of trade and the necessity of obtaining certain commodities have sometimes so far overpowered this rule, that different species of traffic have been permitted, *prout e re suâ, subditorumque suorum esse*

censent principes. (Bynk. Q. J. B. book i. c. 3.) But it is in all cases the act and permission of the sovereign. Wherever that is permitted, it is a suspension of the state of war *quoad hoc*. It is, as he expresses it, *pro parte sic bellum, pro parte pax inter subditos utriusque principis*. It appears from these passages to have been the law of Holland; Valin, l. iii. tit. 6, art. 3, states it to have been the law of France, whether the trade was attempted to be carried on in national or in neutral vessels. It will appear from a case which I shall have occasion to mention (*The Fortuna*), to have been the law of Spain; and it may, I think, without rashness be affirmed to have been a general principle of law in most of the countries of Europe.

By the law and constitution of this country, the sovereign alone has the power of declaring war and peace. He alone, therefore, who has the power of entirely removing the state of war, has the power of removing it in part, by permitting, where he sees proper, that commercial intercourse which is a partial suspension of the war. There may be occasions on which such an intercourse may be highly expedient. But it is not for individuals to determine on the expediency of such occasions on their own notions of commerce, and of commerce merely, and possibly on grounds of private advantage not very reconcilable with the general interests of the state. It is for the state alone, on more enlarged views of policy, and of all circumstances that may be connected with such an intercourse, to determine when it shall be permitted, and under what regulations. In my opinion, no principle ought to be held more sacred than that this intercourse cannot subsist on any other footing than that of the *direct permission of the state*. Who can be insensible to the consequences that might follow, if every person in time of war had a right to carry on a commercial intercourse with the enemy, and under colour of that, had the means of carrying on any other species of intercourse he might think fit? The inconvenience to the public might be extreme; and where is the inconvenience on the other side, that the merchant should be compelled, in such a situation of the two countries, to carry on his trade between them (if necessary) under the eye and control of the government, charged with the care of the public safety?

Another principle of law, of a less politic nature, but equally general in its reception and direct in its application, forbids this sort of communication as fundamentally inconsistent with the relation at that time subsisting between the two countries; and that is,

2 x 2

the total inability to sustain any contract by an appeal to the tribunals of the one country on the part of the subjects of the other. In the law of almost every country, the character of alien enemy carries with it a disability to sue or to sustain in the language of civilians a *persona standi in judicio*. The peculiar law of our own country applies this principle with great rigour. The same principle is received in our Courts of the law of nations; they are so far British Courts that no man can sue therein who is a subject of the enemy, unless under particular circumstances that *pro hac vice* discharge him from the character of an enemy; such as his coming under a flag of truce, a cartel, a pass, or some other act of public authority that puts him in the king's peace *pro hac vice*. But otherwise he is totally *exlex*; even in the case of ransoms,¹ which were contracts, but contracts arising *ex jure belli*, and tolerated as such, the enemy was not permitted to sue in his own proper person for the payment of the ransom bill; but the payment was enforced by an action brought by the imprisoned hostage in the courts of his own country for the recovery of his freedom. A state in which contracts cannot be enforced, cannot be a state of legal commerce. If the parties who are to contract have no right to compel the performance of the contract, nor even to appear in a court of justice for that purpose, can there be a stronger proof that the law imposes a legal inability to contract? To such transactions it gives no sanction—they have no legal existence; and the whole of such commerce is attempted without its protection and against its authority. Bynkershoek expresses himself with great force upon this argument in his first book, chapter 7, where he lays down that the legality of commerce and the mutual use of courts of justice are inseparable. He says that cases of commerce are undistinguishable from cases of any other species in this respect. *Si hosti semel permittas actiones exercere, difficile est distinguere ex quâ causâ oriantur, nec potui animadvertere illam distinctionem unquam usu fuisse servatam.*

Upon these and similar grounds it has been the established rule of the law of this Court, confirmed by the judgment of the Supreme Court, that *a trading with the enemy, except under a royal license, subjects the property to confiscation*; and the most eminent

¹ Ransoms, except in cases of necessity to be allowed by the Court of Admiralty, have been abolished. 22 Geo. III. c. 25; 35 Geo. III. c. 66, ss. 35, 36; 45 Geo. III.

c. 72, ss. 16 *et seq.*; 17 & 18 Vict. c. 18, ss. 42, 43, 44. See Wildman on International Law, p. 275.

persons of the law sitting in the Supreme Courts have uniformly sustained such judgments.

In *The Ringende Jacob*, 1747, Andreas Laud, master, a Swede, which went from London to Bordeaux in ballast, there took in seventy-one tuns of wine for Mr. Minet, Mr. Challie, and Mr. Fetherstonhagh, to be delivered at Guernsey, but with false clearances at Bordeaux to deceive the enemy. Condemned by the Lords of Appeal, 7th of February, 1750, in affirmance of the judgment of the Admiralty.

In *The Lady Jane*, a Hamburgh ship, laden at Malaga with mountain wine, cargo claimed by English merchants, as the produce of goods sent to Spain before the war. Condemned 13th of April, 1749; present, Lord President, Archbishop of York, and Baron Clerke.

In *The Deergarden*, of Stockholm, woollen goods shipped ostensibly at Lisbon, voyage in fact to the enemy's port at Bilboa, but on British account.—Cargo condemned, 15th of March, 1747.

In *The Elizabeth*, of Ostend, cargo the property of British subjects coming from an enemy's port. Condemned 27th of January, 1749; present, Duke of Dorset, Earl of Pembroke, Right Hon. *W. Pitt*, Mr. Justice *Dennison*, Mr. Justice *Clive*. Held, "that a British subject cannot trade with the enemy, but that the only punishment which the Admiralty can inflict was confiscation of the goods."

In *The Juffrow Louisa Margaretha*, Lords, 3rd of April, 1781, a case of a claim of Messrs. Escott and Read, of London, for wines and other articles shipped on board a Dutch ship, April 7, 1780, at Malaga, for their account. The affidavit of the claim stated, that Mr. Escott was one of a house of trade, known by the name of Escott and Read, of London; that they had for twenty years immediately preceding hostilities between Great Britain and Spain, carried on considerable trade to and from Malaga, and had an established house of trade at Malaga, where Mr. Escott had resided about thirty years preceding, excepting the last ten months, when he had left that place, and had since resided in England. It further stated, that considerable quantities of wine and other merchandise belonging to the said house (deposited in vaults and warehouses set apart for the same) had been left at Malaga under the care of Mr. Grivegree, a Fleming by birth, brought up in that house, who was suffered to remain to preserve the said goods during hostilities, unless a favourable opportunity should offer of sending them to London. It stated the destination to have been to Ostend, and

the property to have been described for neutral account and risk, to avoid the enemy's cruisers; and claimed the whole as the entire property of the house of London, out of which Mr. Grivegneé was to receive fourteen per cent., but no other emolument whatever. The judgment of the Court of Admiralty, rejecting the claim of Mr. Escott, was affirmed; present, the Earls of Bathurst, Sandwich, Marchmont, Hillsborough, Clarendon, Viscount Stormont, Lord Grantham, Lord Loughborough, Chief Justice of the Common Pleas, Sir Richard Worsley, Sir J. Goodricke, Sir J. Eardley Wilmot.

In *The St. Louis*, alias *El Allesandro*, Lords, July 18th, 1781, the case of a claim of Messrs. Morgan and Mather, for certain peltries shipped by them on board a vessel of New Orleans, bound to Bordeaux, and consigned to merchants there, on the proper account and risk of the shippers. The affidavit stated the history of Mr. Morgan from the year 1764, when he left England to settle in West Florida, and his subsequent transactions from 1774, on the river Mississippi; where, finding no troops nor any sort of protection granted by the British government to those settled on the British part of the banks of that river, he had kept a ship as a floating storehouse, living himself at New Orleans by permission of the governor, under an express condition that he should not land any sort of goods in any part of the Spanish dominions. It then stated, that in 1779, finding the American troops in such force all over the river as to prevent any English ship from coming up the river, and that it was impossible to make any remittances to England but by hiring neutral vessels, he shipped the goods in question on board the 'St. Louis,' 27th of April, 1779, belonging to inhabitants of New Orleans, at that time neutral subjects, that being the only vessel at New Orleans bound to any port of Europe; that they were consigned to merchants at Bordeaux, to be there sold, and the proceeds remitted to Mr. Mather in London; that he was obliged to resort to this mode of remittance that the goods might not perish on his hands.

Annexed to the affidavit was a certificate of Colonel Dickson, the British commander in those parts, certifying that Mr. Morgan, a British subject,¹ had received permission; under the twelfth article

¹ In *The Victoria*, Lords, July 20, 1781, the property of the same gentleman, Mr. Morgan, in the ship purchased of a Spanish subject, 21st of April, 1779, and

in the cargo shipped at New Orleans, 16th of April, 1779, and consigned to London, was restored.

The circumstances of that case were

of the Capitulation of Baton Rouge, to convey himself and family to London under a passport from the Spanish governor. The sentence of the Court of Admiralty, condemning the ship and cargo as enemy's property, or otherwise liable to confiscation, was affirmed; present, Earl of Bathurst, Earl of Clarendon, Lord Loughborough, Chief Justice of the Common Pleas.

In *The Compte de Wohronzoff*, Lords, 19th of July, 1781, a case of a claim of Mr. Daly, Mr. G. Byrne, and other Irish merchants, for the ship and certain quantities of French wines shipped at Bordeaux, May, 1780, on their account, with ostensible papers for Russia. It was stated in support of their claim, that during the whole of the war the Commissioners of his Majesty's revenue and excise in Ireland, had constantly permitted trade to be carried on from Bordeaux to Dublin, in the same manner as it was before hostilities commenced; and all ships belonging to British owners, navigated according to law, with cargoes the property of British owners, coming immediately and openly from Bordeaux, had been and still were admitted to enter and invoice their cargoes from thence; and that on all cargoes so entered the regular duties had been paid.

An Act of Parliament was recited, passed in Ireland in the 19th and 20th of his present Majesty, by which it is enacted, that from the 24th of June, 1780, till the 25th of December, 1781, there should be paid an additional duty of £10. 7s. per tun on all French wines imported into the kingdom of Ireland during the said period. The practice of admitting such cargo to an entry was proved by an extract from the entries office, by which it appeared that several cargoes of a similar nature had been permitted to enter. And it

that Mr. Morgan had shipped the goods 16th of April, 1779, on board a Spanish ship, bound to a Spanish port, but afterwards the destination was altered for London; on the 20th the ship sailed, but the master hearing in the river that there was a prospect of approaching hostilities between England and Spain, returned, and refused to proceed, unless he was indemnified against all loss. Mr. Morgan then purchased the ship of the master; she sailed for London, with the Spanish master and crew, and under Spanish colours, and was captured 7th of June, 1779, by a privateer commissioned against France. The order of Council for re-

prisals against Spain issued 18th of June, 1779.

The præsertim of the Appeal stated the transfer of the ship to have been a fictitious transfer, and that Mr. Morgan was at the time of the transfer a Spanish subject, residing and carrying on trade at New Orleans; that by the proofs, the ship and cargo appeared to be Spanish property, and as such, being taken by a privateer having no commission against Spain, they were to be condemned as *droits* of Admiralty.

Mr. Morgan returned to England after the Capitulation of Baton Rouge, and arrived in London 29th of July, 1780.

was contended, that the Act of the Irish legislature was decisive, as far as it was competent for them to decide, being made long after the commencement of hostilities, as it could not be imagined that they would be inattentive to public affairs, or propose to draw a revenue from a trade prohibited and illegal. The judgment of the Court of Admiralty, condemning the ship and cargo as good and lawful prize, was affirmed, and the appellant was condemned in the costs of the appeal; present, Earl of Bathurst, Earl of Hillsborough, Earl of Clarendon, Lord Loughborough, Chief Justice of the Common Pleas.

In *The Expédite van Rotterdam*, Lords, 18th of July, 1782, a case of the claim of Messrs. Gregory and Turnbull, of London, for a quantity of wine and other articles shipped on board a Dutch ship, December 20th, 1780, at Malaga, for them, though ostensibly for the account and risk of Mr. Carl Thomasze, of Amsterdam, their agent, Holland being then at peace with this country. The affidavit of the claimant recited an Act, passed in the twentieth year of his Majesty's reign to permit goods, the product or manufacture of certain places within the Levant or Mediterranean seas, to be imported into Great Britain or Ireland, in British or foreign vessels, from any place whatsoever, enacting that, from the 1st of January, 1780, any goods which had been usually imported from any port or place in Europe, within the Straits of Gibraltar (with an exception respecting the dominions of the Grand Signior), should and might, during the continuance of the said Act, be imported and brought by any person or persons whatsoever, into Great Britain or Ireland, in any ship belonging to any state in amity with his Majesty. The affidavit stated, that the importation had been in every respect conformable to the said Act, and that the said goods were coming for the sole account, risk, and benefit of their house, being described in the bill of lading to be at the account and risk of Carl Thomasze, only to avoid the enemy's cruisers. The judgment of the Court of Admiralty condemning these goods was affirmed; present, Lord Camden, Earl of Effingham, and Lord Ashburton.

In *The Bella Guidita*, Lords, 20th of July, 1785, a case of a claim of Mr. Vaughan and other British merchants, sending a cargo of provisions on board a Venetian vessel from Ireland to Grenada, one of the islands then lately taken by the French. The affidavit of claim set forth the particular situation of that and the other islands, since they had fallen into the possession of the French; that they were not considered by the French government as entirely

French islands; that by a certain ordinance of the French king, it was ordained that the merchants and inhabitants of all or most of the conquered islands should, as to their trade and commerce, be upon the same terms and footing as the British merchants and inhabitants of the island of Dominica; that by the 17th Article of the Capitulation of the island of Dominica, in 1778, it was permitted to the merchants of the said island, until peace, to receive vessels (except English) to their address from all parts of the world, without their being confiscated; that before Dutch hostilities broke out, the trade between the conquered islands and Great Britain, had been carried on through the island of St. Eustatius, under the sanction of British Acts of Parliament, for the purpose of supplying the islands with provisions absolutely necessary for their subsistence; and of taking off the produce in payment to British merchants, as the only means of keeping down the interests due to them on mortgage on the plantations.

"That after the Dutch hostilities it became notorious to the British government that the obstruction of this trade would be attended with very serious consequences to the British interests in the said islands, and under these considerations an Act was passed in the 20th Geo. III. reciting, that during the said hostilities the islands of Grenada and the Grenadines had been taken by the French king, but it was just and expedient to give every relief to the proprietors of estates in the said islands; and enacting, that no goods or merchandise of the growth, produce, or manufacture of the said islands, on board neutral vessels, going to neutral ports should be liable to condemnation as prize.

"That under this view of the necessitous situation of the said island, and of the favourable manner in which it was considered by the government of this country, the claimants chartered this ship to carry out a cargo of provisions to Grenada, and bring back in return a cargo of the produce of that island; that there was an ostensible destination to St. Thomas merely for the purpose of avoiding the enemies' cruisers.

"The judgment of the Vice-Admiralty Court of Barbadoes, condemning the cargo as *French property*, was affirmed, and the appellants condemned in the costs of appeal; present, Lord Camden, President of the Council, Earl of Effingham, Marquis of Caermarthen, Viscount Howe and Lord Sydney." ¹

¹ The printed papers of appeal contain the following strong representation of the hardship of this case:—

"The appellants and intervener in support of their case, beg leave to observe that as the facts stand now disclosed to

In *The Eenigheid*, Lords, 21st of March, 1795, a case of a claim of Mr. Hankey, of London, and of Mr. Alphen, of Rotterdam, for a quantity of corn shipped on board a Lubeck ship, in December, 1792, from Rotterdam to Nantes. It appeared from the evidence, that the ship was chartered for this voyage on the 6th of December, 1792, and that the cargo was actually laden in the same month, but by various accidental delays the ship was prevented from putting to sea till the 9th of February. Hostilities were declared by the ruling powers of France against England and Holland on the 1st of February, 1793. It was contended for the captors, that hostilities having been declared by the ruling powers of France against England and Holland, on the 1st of February, 1793, no cargo could lawfully be sent from Holland for France, on account of British and Dutch subjects, on the 9th of the same month; subsequent to which, this ship with the cargo of wheat in question on board, set sail from Helvoetsluys for Nantes; and having been captured in such voyage on the 26th of that month, the cargo was rightly, justly, and lawfully condemned as prize to the British

your Lordships, the single question arises, *whether it was so unlawful for a British subject to send supplies to the British plantations in the Grenada islands whilst under the misfortune of a temporary subjection to the French, as that a confiscation of the supplies so sent should be the just and legal consequences of his misconduct?* and they humbly presume that this question cannot possibly be answered in the affirmative by those who consider the favourable principles of the various Acts of Parliament relating to the British captured islands, the attentions of his Majesty's ministers to the relief of the proprietors, and the peculiar exigence of public affairs which called both upon the legislature and the executive government to authorize special provisions for cases which happily have had but few precedents in the history of this country.

"In the late unfortunate war Great Britain saw many of its valuable West Indian possessions fall into the hands of the enemy, from its absolute inability to protect them. The proprietors being still British in principle and affection, and many of them by actual residence, and the hope being constantly entertained, as

well by the public as by individuals, that these islands would soon revert to the dominion of their natural sovereign, the Parliament, in the several cases of Nevis, Montserrat, St. Christopher's, Grenada, and the Grenadines, expressly permitted the produce of these plantations to be conveyed to Europe free from British capture, under limitations intended merely to prevent the abuse of this permission by the clandestine extension of it to the produce of foreign colonies. In this provision the principle appears to be clearly recognized and established *that these islands, though captured, were not to be considered as French*; for upon what other principle could British protection have been imparted to them? and if the British legislature did thus solemnly declare its intention to protect and encourage the produce of these plantations during the remainder of the war, upon what grounds of legal or political analogy can it be contended that it was criminal to transmit those supplies, without which these plantations could not possibly be continued in a state of culture? Does not the expressed permission of exportation involve a permission of all that species of neces-

captors. The sentence of the Court of Admiralty condemning the whole cargo, was affirmed; present, Earl of Mansfield, President of the Council, Lord Auckland, Sir Richard Pepper Arden, Master of the Rolls, Sir J. Eyre, Chief Justice of the Common Pleas, Sir W. Wynne, Charles Greville, Esq.

In *The Fortuna, Kock*, Lords, 27th of June, 1795, a case of a claim of Messrs. Tupper and Drake, British merchants carrying on trade at Barcelona, for a quantity of goods shipped on board a Swedish vessel at Barcelona, January, 1793, and destined to Calais. It appeared in evidence that the ship was chartered for this voyage on the 11th of January, 1793, that she sailed to Tarragona and Saloe (in which latter port she arrived on the 15th of February), and completed her cargo, and sailed on her voyage to Calais on the 21st of March. The ship was taken on the 8th of April, by a Spanish frigate, and released under this sentence of the Spanish Court of Admiralty, in these terms:—"That considering the vessel is under neutral colours; that the cargo does not consist of contraband goods; that the concerned do not appear other than merchants resident in Spain; that the war was not declared against France, neither when she was laden nor when she was detained, because it was on the 20th of March, and the last bill of lading appears dated at Saloe on the 15th of the said month, from whence she sailed on the 21st, they ought and did command the said brig to be set at liberty." For the captors it was contended, that the

sary importation, without which the pretended permission of the other is merely nugatory and insulting?

"The conduct of his Majesty's executive government was no less favourable to the interests of the unfortunate British proprietors. Various applications to his Majesty's ministers on the behalf of these proprietors were always readily entertained and attentively considered; and the appellants and intervener deem much too highly of the wisdom and integrity of his Majesty's servants to suppose, that whilst they were listening to every proposal for the relief of these islands, they were at that moment conscious to themselves that in truth they were only consulting for the better security of the property of the French.

"Upon the extreme exigence of public affairs at that period, the appellants and

intervener forbear to enlarge. It remains for your Lordships to decide whether these could possibly be the intentions of the British government, viz.:—That those islands should be condemned to absolute sterility by a refusal of such necessary supplies as the French, from a partiality for their own islands, found it convenient to withhold from them; that the only practicable mode for the immediate collection of British debts, secured upon these plantations to an enormous amount, should be prohibited and punished; and that Great Britain, instead of receiving many important articles of consumption and commerce from its ancient markets, which it still continued to consider as its own, should lie at the mercy of the ancient markets of the enemy upon such terms as a successful monopoly would prescribe."

ship was liable to confiscation, because she sailed from Spain for Calais many months subsequent to the commencement of hostilities by the French against this country and against Spain; and because it was incumbent on the proprietors to have prevented the sailing of this ship from Spain for Calais, or to have shown that every endeavour had been used for that purpose. The sentence of the High Court of Admiralty condemning the cargo was affirmed; present, Earl of Mansfield, Lord St. Helens, Sir W. Wynne, Sylvester Douglas, Esq.

In *The Freeden*, Lords, July 4th, 1795, a case of a claim of Messrs. Herries, Keith, and Stembor, of Barcelona, merchants, for a quantity of brandies shipped on board a Swedish ship at different Spanish ports, in the months of March and April, 1793. It appeared in evidence that the firm consisted of Sir Robert Herries and Charles Herries, resident in London, Alexander Keith, a British subject resident at Barcelona, George Keith, a British subject resident at Ostend, and Frederick Stembor, a Dutch subject resident at Barcelona. The vessel was chartered on the 7th of March, for Ostend. On the 14th of March she sailed from Barcelona to Terrendembarra, and from thence on the 23rd of March for Terragona, where the cargo in question was completed; she sailed from thence on the 3rd of April, and put into Malaga on the 6th of May; and proceeding on her voyage was taken on the 2nd of June by a French privateer, and retaken on the 23rd by the respondents. On the former hearing leave was given to Sir Robert Herries, resident in London, to give proof that on the breaking out of hostilities they had taken means to prevent their being implicated in the consequences of an illicit commerce. A letter was accordingly brought in, written on the 12th of February, 1793, in which was this passage:—"We have learnt with certainty the declaration of war in France against this country and Holland, as well as the actual commencement of hostilities by the capture of several of our own trading-vessels; in consequence of which letters of marque and general reprisals are granted here against all ships and goods belonging to France, or to any persons being subjects of France, or inhabiting within any of the territories of France." The judgment of the High Court of Admiralty, condemning the cargo, was affirmed; present, Earl of Mansfield, Lord President of the Council, Sir Richard Pepper Arden, Sir W. Wynne, Sylvester Douglas, and Charles Greville, Esqrs.

In *The William*, Lords, December 19th, 1795, a case of a claim

of Messrs. Munro, Macfarlane, and Co., of Grenada, for a quantity of sugars shipped on their account at Guadaloupe, in June, 1793. It appeared from the claimant's affidavit, that for some years prior to the war a trade had been carried on by the merchants of the British islands, supplying the French islands with slaves on credit, to receive payment in sugars of the ensuing year. That there was on that account always a considerable debt due to them from the French merchants. That the sugar in question had actually been received at Guadaloupe by the agent of the claimants, for slaves sold on their account prior to the war. The judgment of the Vice-Admiralty Court of St. Christopher, condemning the ship and cargo, was affirmed; ¹ present, Earl of Mansfield, President of the Council,

¹ In this case, the extreme hardship of the rule contended for was strongly urged by Dr. Nicholl (afterwards King's Advocate), and Mr. Stephen, as applied to the situation of the present claimants. It was argued, that there were no other means of obtaining a remittance, as payment by produce was the usual mode of dealing as well in the English as the French islands; that they were too remote from the seat of government to obtain a license from England in time, and that there was no authority in the West Indies competent to dispense with the rule contended for; that to deny the claimants this mode of getting off their effects was to maintain that they were absolutely bound, without any alternative, to leave them in the hands of the enemy; that this distinction arose between the present case and former precedents; that there was in this case no accommodation to the enemy, but rather an impoverishment, in taking out of their reach valuable articles for which no further compensation was to be made; that it differed therefore from cases of exporting to the enemy's country, or of importing from thence for reciprocal profit; that the commercial treaty between Great Britain and France allowed a month after the breaking out of hostilities for the removal of property from the enemy's country; that the present shipment was within that period after the time when notice of the war first arrived in these parts; and that

if British subjects were not permitted by their own government to avail themselves of the favourable stipulation of the treaty, it became a snare rather than a protection to those who were induced to engage in trade on the faith of it.

For the captors. All questions respecting the property which had been contested in the Court below, was given up by the then King's Advocate, Sir *W. Scott*; and the case was expressly placed on the ground that the claimants, being British or Dutch subjects, were taken in the act of trading with the enemy contrary to their allegiance. The case of *The Lady Jane*, in 1749, in which the produce of goods sold in the enemy's country before the truce, and that of *The Juffrow Margaretha*, where wines left in store and afterwards shipped in specie, were condemned, were relied on. It was expressly contended that there was no difference between *going to* or *coming from* the enemy's ports, as they were equally acts of commercial intercourse with the enemy, which by the law of war was universally prohibited; that the power of the crown to dispense with this rule, in particular cases, was a sufficient answer to every objection on the ground of hardship; and that the allowing of commerce with the enemy, even for the specious purpose of withdrawing property, without such previous license, would be opening a wide door for treasonable communications with the enemy.

Lord St. Helens, Sir Richard Pepper Arden, Master of the Rolls, and Sir W. Wynne.

I omit many other cases of the last and the present war, merely on this ground, that the rule is so firmly established that no one case exists which has been permitted to contravene it. For I take upon me to aver that all cases of this kind which have come before that tribunal have received an uniform determination. The cases which I have produced prove that the rule has been rigidly enforced. Where Acts of Parliament have on different occasions been made to relax the navigation law and other revenue acts; where the government has authorized, under the sanction of an Act of Parliament, a homeward trade from the enemy's possessions, but has not specifically protected an outward trade to the same, though intimately connected with that homeward trade, and almost necessary to its existence; that it has been enforced where strong claims not merely of convenience, but almost of necessity, excused it on behalf of the individual; that it has been enforced where cargoes have been laden before the war, but where the parties have not used all possible diligence to countermand the voyage after the first notice of hostilities; and that it has been enforced not only against the subjects of the crown, but likewise against those of its *allies* in the war, upon the supposition that the rule was founded on a strong and universal principle, which allied states in war had a right to notice and apply mutually to each other's subjects. Indeed, it is the less necessary to produce these cases, because it is expressly laid down by Lord *Mansfield*, as I understand him, that such is the maritime law of England.¹ And he who for so long a time assisted at the decisions of that Court, at that period could hardly have been ignorant of the rule of decision on this important subject; though none of the instances which I happen to possess prove him to have been personally present at those particular judgments. What is meant by the addition "but this does not extend to a neutral vessel," it is difficult to conjecture, because no man was more perfectly apprised that the neutral bottom gives, in no case, any sort of protection to a cargo that is otherwise liable to confiscation; and therefore I cannot but conclude, that the words of that great person must have been received with some slight degree of misapprehension.

What the common law of England may be, it is not necessary nor perhaps proper for me to inquire. But it is difficult to con-

¹ *Gist v. Mason*, 1 T. R. 85.

ceive that it can by any possibility be otherwise; for the rule in no degree arises from the transaction being upon the water, but from principles of public policy and of public law, which are just as weighty on the one element as on the other, and of which the cases have happened more frequently upon the water, merely in consequence of the insular situation of this country; but when an enemy existed in the other part of the island (the only instance in which it would occur upon the land), it appears from the case referred to by that noble person, to have been deemed equally criminal in the jurisprudence of this country.

The general rule of law being, in my apprehension, clear, it is only to be inquired whether there are any distinctions which take this case out of the application? But I need not add that these must be legal distinctions, and not such as present mere considerations of indulgence and compassion, or mere considerations of the utility of the particular commerce; for to these the Court has no power to give way. A reference has been made to the statutes. It is not argued that the statutes will, in the just apprehension of them, authorize such a trade, but that they might have led to an innocent mistake on the subject. These statutes, it is admitted, were made to apply only to the property of persons in Holland while hostilities were impending. It was necessary that some provisions should be made for the security of the loyal Dutchmen who might migrate to this country. It was found necessary, on this account, to relax the navigation laws; and for this purpose an order of council first issued, which was afterwards confirmed by these Acts as necessary to support the order and protect those who acted under it, but merely with respect to property so circumstanced. These were mere custom-house regulations and nothing else; and it is impossible to entertain a doubt respecting the interpretation of them.

It appears that these parties had before applied to council for special orders, and had always obtained them. It is much to be regretted that they had not applied again to the same source of information. Instead of doing so, they consulted the Commissioners of the Customs, very proper judges to ascertain what goods might be imported under the revenue laws; but this is a matter of general law, on which they are not the persons best qualified to give information or advice. The intention of all the parties might be perfectly innocent; but there is still the fact against them of that actual contravention of the law which no innocence of inten-

tion can do away. The same pleas were urged, and with equal reason, for Mr. Escott, and in many other cases; but it has been decided by a Court which has much greater power of construction, that such pleas could not be sustained. I may feel greatly for the individuals who, I have reason to presume, acted ignorantly under advice that they thought safe. But the Court has no power to depart from the law which has been laid down, and I am under the necessity of rejecting the claims.

Freight and expenses were given to the master.

On application that the Court would decree the expenses of the claims, to be paid out of the cargo, it was contended that there was no instance in which the Court had done this but in cases of recapture.

The Court directed the expenses to be paid.

"In the case of *The Hoop*," observes a late eminent judge and jurist,—Mr. Justice *Story*, "Sir *William Scott* discussed at large the question, how far trading with a public enemy was allowable; he reviewed all the authorities, and adverted to the leading principles of reason and policy. He declared that there existed a general rule in the maritime jurisprudence of the country, by which *all trading with the public enemy, unless with the permission of the sovereign, was interdicted*, and he showed that this was a general principle of law in most of the countries of Europe. . . . By plain, clear, and, as it appears to me, masterly reasoning, did Sir *William Scott* overthrow the notion of any admissible trade with the enemy, without the authentic and special license of the king. . . . It is difficult to conceive that the common law of England can, by any possibility, be otherwise, for the rule in no degree arises from the transactions being

upon the water, but from principles of public policy and public law, which are just as weighty upon the one element as the other. The Court has no power to depart from the law on this subject on considerations of compassion or of the utility of the particular commerce. The property engaged in such commerce is subjected to forfeiture; and the rule was unbendingly applied in the very case of *The Hoop*, though the articles imported from Holland were of essential use in manufactures, and were imported under an assurance from the Commissioners of Customs in Scotland that they might be lawfully imported without license, under the statute 35 Geo. III. Sir *William Scott* said he felt greatly for the individuals, who he had reason to presume acted ignorantly, under advice that they thought safe; but the Court had no power to depart from the law which had been laid down. I can only add upon the conclusion of

that decision, that any court of justice that can expound the law with such admirable perspicuity, and maintain it with such intrepid firmness, in spite of all personal feelings and of the hardships and compassion of the case, must impart honour to the country in which it is instituted, as well as command the confidence and esteem of the rest of mankind." See also *Potts v. Bell*, 8 T. R. 548-561; *The Charlotta, Dupleix*, 1 Dods. 387; *Esposito v. Bowden*, 7 Ell. & Bl. 763-778; *The Ionian Ships*, Spinks, Adm. Rep. 193-206.

In ascertaining who will be considered an alien enemy, so as to render a trade with him illegal, it should be remembered that domicile will be the test for determining his character. If a person is domiciled with the enemy, whether he be a neutral or even a native-born subject (*The Indian Chief*, 3 C. Rob. Adm. Rep. 18), he will be considered as an alien enemy, and all dealings with him will be illegal. See *Potts v. Bell*, 8 T. R. 548; *M'Connell v. Hector*, 3 Bos. & P. 113, 118; *Roberts v. Hardy*, 3 Mau. & Selw. 533; *Willison v. Patteson*, 7 Taunt. 439; *O'Mealey v. Wilson*, 1 Campb. 481.

Any country or port of which the enemy is in the occupation, though taken from a neutral, will, for the purpose of the rule forbidding intercourse with the enemy, be considered as being the enemy's country, where it is recognized by our own government as such. This was often decided during the wars of the first Napoleon, with refer-

ence to the countries occupied by his armies (*Bromley v. Hesselstine*, 1 Campb. 75; *Blackburne v. Thompson*, 3 Campb. 61; *Donaldson v. Thompson*, 86, 428; *Johnson v. Greaves*, 2 Taunt. 344; *Hagedorn v. Bell*, 1 Mau. & Selw. 450); and in *The Bella Guidita*, cited in the principal case (*ante*, p. 680), supplies sent to a British colony while under temporary subjection to the enemy were condemned as prize, the transmission of them being considered as a dealing with the enemy.

Without going at large into the question what will constitute a domicile in the enemy's territories, we may briefly remark that all persons who go to reside therein with a knowledge of the war, especially if they have trading establishments therein, and all persons who having come to reside therein before the war, continue their residence for a longer period than is necessary for their convenient departure, will be considered as domiciled with the enemy. Wildman's Inst. of Internat. Law, vol. ii. p. 8. As to national character, see Wheat. Internat. Law, 394, 6th ed.; Wildman's Inst. of Internat. Law, vol. ii. p. 36-117; Manual of Law of Maritime Warfare, by Hazlitt & Roche, p. 22.

Foreigners resident in the country of a belligerent incur all the obligations of subjects of that country, with respect to trading with the enemy. Thus in the well-known case of *The Angélique*, *Streng*, 3 C. Rob. App. B. 7, a ship and cargo claimed on behalf

of Armenian merchants resident at Madras, taken on a voyage from Madras to the Spanish settlement of Manilla (Great Britain being then at war with Spain), was condemned by the Court of Appeal (affirming the sentence of the Vice-Admiralty Court), as being taken trading with the enemy. The Court of Appeal, after a very full hearing, stated it to be their opinion, that by the general law all foreigners resident within the British dominions incurred all the obligations of British subjects; that there was nothing to distinguish this particular class of merchants, in point of law, from the general rule; that whatever doubt might be entertained whether the East India Company might not, in wars originating with them under the power of their charter, relax the operation of war so far as to license the trade of individuals with such an enemy, they could unquestionably have no such power in respect of a trade carried on with a general and public enemy of the crown of Great Britain; that it would on that account be useless to admit the claimants to prove, as it was offered, the fact of a tacit or acknowledged permission from the Governor in Council in India. See also *The Indian Chief, Skinner*, 3 C. Rob. 12.

It is not allowable for the subject of an ally to trade with the enemy during a conjoint war, without being liable to a forfeiture of his property engaged in such trade, in the Court of the ally. See *The Nayade, Mertz*, 4 C. R. 251-253,

where it is stated that the case of *The Eenigheid* (cited *ante*, p. 682) had effectually disposed of this question, where it being contended that we had no right to inflict forfeiture on a subject of Holland, it was replied, "that it was no particular law of this country that inflicted such a penalty, but that it was an universal principle of the law of nations, and that it would place this country in a very disadvantageous situation indeed, if the subjects of an ally in war might trade with the enemy, whilst the property of British subjects so employed was subject to confiscation."

There is an important exception to the rule, that a subject of a belligerent power cannot trade with the enemy of his country, for if such subject be domiciled in a neutral country, he acquires the privileges of a neutral, and may therefore carry on trade with powers at war with his own country. *The Danous*, 4 C. Rob. 255, n.; *Bell v. Reid*, 1 Mau. & Selw. 726; *The Emanuel, Soderstrom*, 1 C. Rob. 296; *Bell v. Buller*, 1 Mau. & Selw. 726; *Marryat v. Wilson*, 1 Bos. & P. 430; *The Neptunus*, 6 C. Rob. 408; *The Ann, Smith*, 1 Dods. 223.

All property taken when engaged in trade with the enemy will be forfeited as prize to captor, and not to the crown. "The ground of the forfeiture is," as observed by a learned judge, "that the property is taken adhering to the enemy, and therefore the proprietor is *pro hac vice* to be con-

sidered as an enemy." *The Nelly*, *Perrie*, 1 C. Rob. 219 n.

Persons whose nation is merely under the protectorate, and who are not *subjects*, of Great Britain, may carry on trade with the enemy. This was decided during the late war with Russia. See the case of *The Ionian Ships*, Spinks, Adm. Rep. 198. There it was held by Dr. Lushington, that the inhabitants of the Ionian Islands might trade with Russia. "I should," said the learned judge, "restore the ship on the following grounds. First, because it is not the property of British *subjects* in any sense of the term, consequently it cannot be, as the property of a British subject, illegally engaged in trade with Russia on the ground of the war with Russia. Now it may be, as to this head, not unimportant to consider on what ground the property of a British merchant trading with the enemy of Great Britain during war is condemned. We have all the law in the case of *The Hoop* (1 C. Rob. 196), and in *The Nelly*, cited in *The Hoop*. It is upon the ground that such property is taken adhering to the enemy; and therefore the property being bound not so to adhere, is considered, *pro hoc vice*, committing an illegal act. Such property belonging to a neutral, is not adhering to the enemy in the sense which is meant in this judgment, for he has no enemies to adhere to. The prohibition is to British subjects only, or to allies in the war. Now Lord Stowell, in the case of *The Hoop*, especially relied on the authority of Byn-

kershoek, and upon a greater authority he could not have placed his dependence; and every word in the passages quoted, and in the whole treatise, relates to *subditi*—to *subjects*, and to *subjects only*. That is the expression used by Bynkershoek—to subjects and subjects only. So in the numerous cases cited by Lord Stowell, the whole inquiry is, whether the property claimed was the property of British subjects—the subjects of Great Britain in the sense in which the term is used in Courts of Prize, namely, *persons carrying on trade in territories subject to the British crown*, and consequently owing at least a temporary allegiance to the crown of Great Britain. Do then the subjects of the Ionian States stand in *eadem conditione*? It is admitted on all hands that they are not British subjects in the proper sense of the term; for to make such an averment would set the whole treaty at naught; it would be to make a mockery of the most stringent stipulations contained in that treaty. Diplomatic authorities may do so—a court of justice cannot. . . . I shall restore; because the property is not the property of allies in the war, for neither by the treaty nor by the law of nations can I impose on the subjects of the Ionian States that character. Again, I shall restore, because if Great Britain had the right by treaty of declaring war between the Ionian Islands and Russia, she has not done it; and because, in the absence of all such declaration or solemn act, in

whatever form, I am of opinion that the Ionian subjects are not placed in a state of war." See also *The Leucade*, 1 Spinks, Adm. Rep. 217.

As might naturally be supposed, from the relations existing between the subjects of different states during a state of peace, many attempts, upon the breaking out of war, will be made to evade the rule, forbidding any dealing or trade with the enemy. The Courts, however, will enforce it strictly, and will not suffer it to be infringed by any indirect means or through the intervention of a third party. Hence it has been held that it is illegal for a subject, without the license of the crown, to bring even in a neutral ship goods from an enemy's port, which were purchased by his agent resident in the enemy's country after the commencement of hostilities; though it might not appear that they were purchased from the enemy. *Potts v. Bell*, 8 T. R. 548.

Nor will a British subject be able to evade the consequences of trading with the enemy, by shipping goods in the first instance to a neutral port. "The interposition," says Sir *William Scott*, "of a prior port makes no difference; all trade with the enemy is illegal; and the circumstance that the goods are first to go to a neutral port will not make it lawful. The trade is still liable to the same abuse and to the same political danger, whatever that may be. I can have no hesitation in saying, that during a war with Holland

it is not consistent to a British merchant to send goods to Embden, with a view of sending them forward on his own account to a Dutch port, consigned by him to persons there, as in the course of ordinary commerce." *The Jonge Pieter*, 4 C. Rob. 84.

If the property of a subject of a belligerent state has been fraudulently transferred to a neutral, in order to evade the consequences of trading with the enemy, it will be forfeited. See *The Odin, Hals, Master*, 1 C. Rob. 248. There a British ship, which had been ostensibly transferred to a Dane, was seized trading with the enemy: it was held by Sir *William Scott*, that the cargo as well as the vessel, both of which were claimed by the Dane, were forfeitable, the ship not having been *bond fide* transferred, and therefore still remaining British property. "If the claim," said the learned judge, "is deemed fraudulent as it respects the property of the ship, it will, I think, be entitled to little regard as it respects the property of the cargo claimed for the same proprietor, and appearing evidently to be concerned in one and the same original adventure. I am not aware of the obligation that lies upon the Court, in the case of such a claim, to separate its sound from its diseased parts, for the benefit of a claimant detected in the falsehood of a considerable portion of his claim. He has no right to insist that a discrimination shall be made in the property, which, if any part be his own, he has fraudulently and with

corrupt views mixed up with the property of others."

In order to constitute the offence of trading with the enemy, there must be an *act* of trading to the enemy's country, as well as the *intention* of doing so after the breaking out of war. In *The Abby*, 5 C. Rob. 251, a ship belonging to a British subject before the breaking out of hostilities with Holland, sailed from Liverpool to Demerara, at that time a Dutch colony, and was taken off that island, after its surrender to the British forces: Sir *William Scott* decreed restitution on payment of the captor's expenses. "If," said the learned judge, "a man fires a gun at sea, intending to kill an Englishman, which would be legal murder, and by accident does not kill an Englishman, but an enemy, the moral guilt is the same, but the legal effect is different. The accident has turned up in his favour; the criminal act intended has not been committed, and the man is innocent of the legal offence. So, if the intent was to trade with an enemy (which, I have already observed, cannot be ascribed to the party at the commencement of the voyage, when hostilities were not yet declared), but at the time of carrying the design into effect the person is become not an enemy, the intention here wants the *corpus delicti*. No case has been produced in which a mere *intention* to trade with the enemy's country, contradicted by the fact of its not being an enemy's country, has insured to condemnation. Where

a country is known to be hostile, the commencement of a voyage towards that country may be a sufficient act of illegality; but where the voyage is undertaken without that knowledge, the subsequent event of hostility will have no such effect. On principle I am of opinion that the party is free from the charge of illegal trading. As to the other ground, there appears to me to have been neither *intention* nor *act*. . . . On both these points, therefore, I am of opinion, that the claimant is entitled to the restitution of his property. On the first there was *no illegal act*; on the second, there was neither *intention* nor *act*. On the first ground the Court would have expected the party to have exonerated himself from the intention of trading with the enemy after the knowledge of hostilities, if the colony had remained hostile. As the colony was not hostile at the time of the supposed importation, I think that is not necessary in this case."

A subject resident in an enemy's country cannot carry on commerce there, except by license of the crown; "but the person residing there under that authority, may so lend himself to the enemy's purposes, as in a question with this country to identify himself with the foreign state. The Prize Courts have frequently determined, that if a person residing by license in an enemy's country, even the representative of the crown, should trade there, he is not in that character representing the crown, but

is lending himself to the purposes of the enemy, and his property therefore would be lawful prize." *Ex parte Baglehole*, 18 Ves. 529; 1 Rose, 271.

As laid down in the principal case, by special license of their respective sovereigns, intercourse may be carried on between the subjects of hostile states. "Under this view of the matter," observes Sir *William Scott*, "it is clear that a license is a high act of sovereignty, an act immediately proceeding from the sovereign authority of the state, which is alone competent to decide on all the considerations of commercial and political expediency, by which such an exception from the ordinary consequences of war must be controlled." 4 C. Rob.

11. "The consent of the crown to such a course of trade must be interposed in some way or other. The particular mode in which this consent may be expressed is not material. It may be signified in a variety of ways: by a license granted to the individual for the special occasion, by an order in council, by proclamation, or under the authority of an Act of Parliament, to which the crown is necessarily a party." Per Sir *William Scott* in *The Charlotta, Dupleix*, 1 Dods. 390. The crown, however, cannot control a statute by its license. *Toulmin v. Anderson*, 1 Taunt. 227.

A license to trade with the enemy has been dispensed with upon grounds of public policy. Thus in *The Madonna delle Grazie, Copenzia*, 4 C. Rob. 195, a person

having been long resident in Spain as British consul, before the breaking out of hostilities purchased wines for the supply of the British fleet. After the war had commenced, they were captured on their voyage to Leghorn, to which place they were shipped. Sir *William Scott* decreed restitution. "It would be a considerable discouragement," he observed, "to persons in such situations, at a distance from home, and employed in the public service, if they were to know that in case of hostilities intervening, they would be left to get off their stores as well as they could, with a danger of capture on every side. The circumstances of this case may be taken as virtually amounting to a license; inasmuch as if a license had been applied for, it must have been granted. . . . On the whole I do not think that, by restoring this property, I break in upon any one of the principles which this Court is bound to sustain, as against subjects of this government trading with the enemy."

In like manner as a subject of our own country may trade with the enemy under the license of the sovereign, so may a subject of an ally do so with the permission of the proper authorities. *The Neptunus*, 6 Rob. 403. Where this permission is readily accorded, it may constitute a good reason for the other co-belligerents granting the same permission, in order that their subjects may enjoy equal commercial advantages. Thus "in 1705, when England and Holland were allies in war against France

and Spain, and it was at first (according to the general policy) attempted to prevent all trade with the enemy, on the part of English and Dutch merchants, and several Dutch ships caught in the act of trading to the enemy's country were captured and brought into this country. It appeared afterwards to the English government, that as the Dutch government encouraged their merchants to trade to Spain under passes, it would not be in the power of England effectually to prevent this trade, and that it might prove very detrimental to England if Holland should, by this opportunity, gain possession of the bullion trade, and retain it after the war. Under these considerations, the English government issued an order, August, 1705, for the liberation of all Dutch ships so detained, and directed English cruisers for the rest of that war not to molest English or Dutch ships sailing on a trade to Spain under the passes of their respective governments, since her Majesty has opened the trade with the enemy." 4 C. Rob. 254 n.

The license of an ally to one of its own subjects must, however, be shown either to have been given with the consent of the confederate state, or at any rate that the intercourse carried on with the enemy is of such a nature as not to interfere with their common operations. "It is of no importance to other nations," says Sir *William Scott*, "how much a single belligerent chooses to weaken

and dilute his own rights. But it is otherwise when allied nations are pursuing a common cause against a common enemy. Between them it must be taken as an implied, if not an express contract, that one state shall not do anything to defeat the general object. If one state admits its subjects to carry on an uninterrupted trade with the enemy, the consequence may be that it will supply that aid and comfort to the enemy, especially if it is an enemy depending very materially on the resources of foreign commerce, which may be very injurious to the prosecution of the common cause and the interests of its ally. It should seem that it is not enough therefore to say that *one* state has allowed this practice to its own subjects; it should appear to be at least desirable that it should be shown that either the practice is of such a nature as can in no manner interfere with the common operations, or that it has the allowance of the confederate state." *The Neptune*, 6 C. Rob. 406.

The mode in which licenses are to be construed has been thus laid down by Sir *William Scott*. "Licenses," he observed, "are high acts of sovereignty, they are necessarily *stricti juris*, and must not be carried further than the intention of the great authority which grants them may be supposed to extend. . . . Two circumstances are requisite to give the due effect to a license; first, that the *intention* of the grantor shall be pursued; and secondly,

that there shall be an entire *bona fides* on the part of the user. It has been contended that the latter alone should be sufficient, and that a construction of the grant merely erroneous should not prejudice. This is, I think, laid down too loosely. It seems absolutely essential that that only shall be done which the grantor intended to permit; whatever he did not mean to permit is absolutely interdicted, and the party who uses the license engages not only for fair intentions, but for an accurate interpretation and execution; when I say an accurate interpretation and execution, I do not mean to exclude such a latitude as may be supposed to conform to the intentions of the grantor liberally understood." *The Cosmopolite*, 4 C. Rob. 11, 13. In these terms the law was laid down in the year 1801, by Sir *William Scott*. Eight years afterwards, when the greater part of Europe was under the dominion of France, and intercourse with the different nations of Europe could only be carried on by giving a greater extension to the grant of licenses, which were considered not as mere matters of special and rare indulgence, but were granted with great liberality to all merchants of good character and expressed in general terms, licenses received an enlarged and liberal interpretation, not indeed contrary to the principles before laid down by the same learned Judge, but in order to carry out the *intentions* of the government. In the leading case of *The Goede Hoop, Pieters*, Edw. 332, he laid

it down as a general rule "that where no fraud had been committed, where no fraud had been meditated, as far as appeared, and where the parties had been prevented from carrying the license into literal execution by a power which they could not control, they should be entitled to the benefit of its protection, although the terms might not have been literally and strictly fulfilled." See also *The Vrow Cornelia, Dykstra*, Edw. 350; *The Johan Pieter, Schwartz*, ib. 355; *The Dankbaarheid*, 1 Dods. 187; *Flindt v. Scott and Flindt v. Crockatt*, 5 Taunt. 674, 15 East 525. Moreover, when a government grants a license, it must be supposed to grant all that is necessary to carry it into effect. *The Ohio*, 6 C. Rob. 69, 70. And if it legalizes a trade which would otherwise be unlawful, it must be presumed to authorize all measures necessary to be adopted for its due and effectual prosecution. *Kennington v. Inglis*, 8 East, 273; *Usparicha v. Noble*, 13 East, 332.

Whatever is the fair construction of a particular license when issued, necessarily continues the same while it remains in force, and it will not be considered that government intended to restrict it by a general order in council. *Hendrick, Hansen*, 1 Acton, 322, 380. See further as to licenses and their construction, Wildman's *Instit. of Internat. Law*, vol. ii. p. 245-269; *Manual of Law of Maritime Warfare*, by Hazlitt and Roche, 866.

But another principle of law, as is laid down by Sir *Wm. Scott* (*ante*,

p. 675), forbidding communication with the enemy as fundamentally inconsistent with the relation at that time existing between the two countries, is the total inability to sustain any contract by an appeal to the tribunals of the one country on the part of the subjects of the other. It follows therefore that a state in which contracts cannot be enforced, cannot be a legal state of commerce. All *executory* contracts with subjects of the enemy become at once void on the breaking out of war. All contracts of affreightment, for instance, made during the war, or even made before, if they remain *unexecuted* at the time war is declared, are (as the further execution becomes unlawful or impossible) dissolved on breaking out of the war, and no remedy can be obtained for an alleged breach of them. See *Esposito v. Bowden*, 7 Ell. & Bl. 779, and the elaborate and able judgment of *Willes, J.* See also *Reid v. Hoskins*, 5 Ell. & Bl. 729, 6 Ell. & Bl. 953; *Avery v. Bowden*, 5 Ell. & Bl. 714, 6 Ell. & Bl. 953; *Barrick v. Buba*, 2 C. B. n. s. 563.

Although they were formerly supported by Lord *Mansfield* (*Planché v. Fletcher*, Doug. 251; *Gist v. Mason*, 1 T. R. 84; *Lavabre v. Wilson*, Dougl. 284), it has since been clearly decided that all contracts of assurance of an enemy's property, unless he have license to trade (*Wells v. Williams*, 1 Salk. 45; 1 Ld. Raym. 282; *Kensington v. Inglis*, 8 East, 273; *Conway v. Gray*, 10 East, 536; *Usparicha v. Noble*, 18 East, 332), are invalid,

and no action can be brought upon them after the restoration of peace, even when entered into before hostilities broke out, where the loss by a British capture took place afterwards. *Furtado v. Rodgers*, 3 Bos. & P. 191; and see *Brandon v. Nesbitt*, 6 T. R. 23; *Bristow v. Towers*, ib. 35; *Kellner v. Le Mesurier*, 4 East, 396; *Gamba v. Le Mesurier*, ib. 407; *Brandon v. Curling*, ib. 410; *McConnell v. Hector*, 3 Bos. & P. 113; *De Luneville v. Phillips*, 2 Bos. & P. N. R. 97.

As we have before seen, war puts an end to a partnership between persons whose respective countries have become involved in hostilities. *Ante*, p. 332, 333.

Where the cause of action arises *before* hostilities have commenced, the right of a party to the contract to sue, who thereby becomes an enemy, is only suspended during the war, and revives on the restoration of peace. Thus where an agent effected an insurance on behalf of an alien, and the loss happened *before* he became an enemy, it was held that as the contract was complete, there was only a temporary suspension of the right to sue, and in the absence of a plea of alien-enemy, the plaintiff was entitled to recover. *Flincht v. Waters*, 15 East, 260; and see *Harmer v. Kingston*, 3 Campb. 152; *Boulton v. Dobree*, 2 Campb. 162; *Alcinous v. Nigreu*, 4 Ell. & Bl. 217.

So it seems if a breach of a contract of affreightment took place before the breaking out of war, an alien enemy whose rights to

damages for such breach would be suspended during the war, might be asserted on the arrival of peace.

Upon the same principle, where a foreigner whose country was at war with England, made an application to prove a debt which became due to him from the bankrupt before the breaking out of the war, Lord Chancellor *Erskine* ordered the claim to be entered, and the dividend to be reserved. "If," said his Lordship, "this had been a debt arising from a contract with an alien-enemy, it could not possibly stand, for the contract would be void; but if the two nations were at peace *at the date of the contract*, from the time of war taking place the creditor could not sue; but the contract being originally good, upon the return of peace the right would survive. It would be contrary to justice therefore to confiscate this dividend. Though the right to recover is suspended, that is no reason why the fund should be divided among the other creditors. The point is of great moment, from the analogy to the case of an action; and it is true, a court of law would not take notice of the objection without a plea. It must appear upon the record. Has the case of a contract originally good, and the right suspended by war, never before occurred? Yet I do not know an instance of an application by an alien enemy to the Court to keep the fund, until his right to sue should survive. The policy, avoiding contracts with an enemy, is sound and wise: but where the

contract was originally good, and the remedy is only suspended, the proposition that therefore the fund should be lost is very different."

Ex parte Boussemaker, 13 Ves. 71.

It may be here mentioned that courts of justice will not, for the purpose of their proceedings, direct the subjects of their own country to hold communication with the enemy's country. Thus a commission will not be granted for the examination of witnesses in a hostile country. *Barrick v. Buba*, 16 C. B. 492.

During times of war, truce, or cartel, ships are employed for the purpose of effecting the exchange of prisoners, but if such ships trade with the enemy they will be liable to capture. "Cartel-ships," says Sir *William Scott*, "are subject to a double obligation to both countries not to trade. To engage in trade may be disadvantageous to the enemy, or to their own country. Both are mutually engaged to permit no trade to be carried on under a fraudulent use of this intercourse; all trade must therefore be held prohibited, and it is not without the consent of *both* governments that vessels engaged on that service can be permitted to take in any goods whatever." *The Venus*, 4 C. Rob. 358; *The Rose in Bloom*, 1 Dods. 60; *The Carolina Verhage*, 6 C. Rob. 336.

The law preventing trade with the enemy was considerably relaxed during the late Russian war, by an order in Council of the 15th of April, 1854, whereby it was ordered "that all vessels under a

neutral or friendly flag, being neutral or friendly property, shall be permitted to import into any port or place in her Majesty's dominions all goods and merchandise whatsoever, to whomsoever the same may belong; and to export from any port or place in her Majesty's dominions to any port not blockaded any cargo or goods, not being contraband of war, or not requiring a special permission, to whomsoever the same may belong." And it was further ordered, "That save only and except as aforesaid, all the subjects of her Majesty and the subjects or citizens of any neutral or friendly state shall and may, during and

notwithstanding the present hostilities with Russia, freely trade with all ports and places wheresoever situate which shall not be in a state of blockade, save and except that no British vessel shall, under any circumstances whatsoever, either under or by virtue of this order or otherwise, be permitted or empowered to enter or communicate with any port or place which shall belong to or be in possession or occupation of her Majesty's enemies." 1 Spink's Adm. Rep. Append. v.

The effect of this order appears to have been the allowance, indirectly and through the medium of a neutral flag, of a trade with the enemy.

THE IMMANUEL, EYSENBERG, MASTER.

Nov. 7th, 1799.

[REPORTED 2 C. ROB. 186.]

COLONIAL TRADE OF ENEMY—RULE OF WAR OF 1756.]—*According to the rule of war of 1756, a neutral cannot carry on trade between a belligerent country and its colonies, if he were excluded from that trade in time of peace.*

Relaxations of the rule are not to be extended by construction.

Semle, if the supreme power in the captor's country had authorized a trade to be carried on by its own subjects between the enemy's country and its colonies, that would be deemed to be an authorization of the same trade to neutral countries.

Secus, if it had merely authorized its subjects to trade between its own country and the enemy's colonies, as that could authorize no more than a trading between the neutral country itself and those colonies :

Voyage by a neutral from a French port to St. Domingo, a French colony, held to be illegal.

This was a case of an asserted Hamburg ship taken on the 14th of August, 1799, on a voyage from Hamburg to St. Domingo,¹ having in her voyage touched at Bordeaux, where she sold part of the goods brought from Hamburg, and took a quantity of iron stores and other articles for St. Domingo. A question was first raised as to the property of the ship and cargo; and secondly, supposing it to be neutral property, whether a trade from the mother-country of France to St. Domingo, a French colony, was not an illegal trade, and such as would render the property of neutrals engaged in it liable to be considered as the property of

¹ Then a French colony.

enemies, and subject to confiscation? It was denied that St. Domingo was to be considered in its present state as a French colony. After various observations on these points, further proof was directed to be made of the property; and permission was given to both parties to produce information as to the state and condition of St. Domingo at that time.

On the 5th of August, 1800, the cause was heard on further proof.

For the captors, *King's Advocate* and *Lawrence*.—The proofs of property that have been brought forward seem not to be exposed to much objection, and therefore allowing it to be neutral property, the question remains only as to the effect of the trade in which it has been engaged. Whether St. Domingo is not to be taken as a French colony? And taking it so to be, whether property so engaged in trade between the mother-country and her colony is not, under the established principles of this country, subject to condemnation? That St. Domingo is to be considered as a French colony, sufficiently appears from a variety of circumstances, some of them arising in this very cause: besides the general professions of Toussaint, and the continual communications that are passing between that colony and France, we find in this cause an exemption of duties in respect to the importation of its produce into France, and a general understanding on the part of Mr. Jennish's correspondent at Bordeaux, that the French laws were still in force there. Considering besides that no proof which the Court can receive has been produced on the other side, the fact may be assumed without further argument, that St. Domingo was a French colony and that sufficient ground is laid for the operation of the principle of law, which has always been applied to such cases. As to the general principle of law, it has so often been a *vexata quæstio* in this Court, that it will not be necessary to go at length into all the details of history and reasoning by which it is supported. It will be sufficient to advert to the principles of the war of 1756, when this matter was fully settled on principles that have never yet been abandoned, notwithstanding that they may have undergone temporary relaxations; as in the last war, owing to the fallacious professions of the French government as to the changes of their colonial system. It is notorious that these professions proved untrue; the former principle was re-established, and it has ever since been taken to be in full force, as far as it is not relaxed by the Orders of Council that have been issued this war.

The first orders of 1793 contained no relaxation whatever. In January, 1794, fresh instructions issued, directing the bringing in of West India produce *coming to Europe*, being a *relaxation* as to the intercourse of America with the West India markets; a change thought reasonable from the particular situation of that country, and the treaties that had been made with it; but not operating as any abandonment of the general principle as it respected the colonial system of Europe. Afterwards a *further relaxation* took place, 25th January, 1798, as to the allowance of bringing the produce of the West India Islands to Europe, but only *to the ports of this country, or to some port of the country to which the neutral merchant belonged*. This is the extent of the relaxations that have passed; they have not gone so far as to authorize a commerce between the colony and the mother-country; and by parity of reasoning there can be no pretence to say there has been any relaxation as to the *outward* trade from the mother-country of the belligerent to the colony. In point of principle there can be no distinction made. There is the same support and maintenance of their revenues by payment of duties, the same employment of the experience and industry of French merchants in assorting the cargo, and the same return of profits to them. On the contrary, the injury to the other belligerent is in some respects greater, as it furnishes a supply of war stores, as appears by many of the articles of this cargo, hemp, flax, iron, bricks. It is besides a general consequence of these outward speculations, that they bring a return of importation of colonial produce into France; as it appears in this case that many neutral ships had gone from Bordeaux to St. Domingo, which had found their way back to Bordeaux, although the return of this particular vessel is represented to have been destined for Hamburg. On these grounds it is submitted that this is an illegal trade, subjecting the property engaged in it to condemnation.

For the claimant, *Arnold and Sewell*.—The particulars of this case are, that it was a speculation, beginning at Hamburg, to send certain goods to the market of St. Domingo, with a liberty of touching at Bordeaux, where some of the goods were to be landed and others taken in for St. Domingo. In the original scheme of the voyage the bricks and iron pots were to have been carried on to St. Domingo; but it being found at Bordeaux that some difficulties were likely to arise at the custom-house on the clearing out of such articles, and as it was apprehended that

similar difficulties might arise at St. Domingo, they were landed at Bordeaux, to be sent back to Hamburg, and other articles of the same kind, but about which the same difficulties were not likely to arise, were put on board. The hemp, about which some argument was at first attempted to be raised, was not on board at the time of the capture, and therefore it is conceived that may be laid out of the case. The principal question arises on the legality of going on a voyage of this description from a port of France to a French colony. In respect to the state of St. Domingo, it cannot be denied that the representations of the state of the island were numerous and opposite, clearly showing that the island was at least in a very unsettled state, and affording a just cause of impression on the mind of Mr. Jennish to suppose it was no longer a French colony: there is at least a fair ground for the inducement under which Mr. Jennish states himself to have acted "in engaging in this trade, principally owing to the unsettled state of the island." It being shown that there was sufficient to justify this impression on the part of Mr. Jennish, it may be better to address the argument to the general question, allowing, for argument's sake, that St. Domingo was at this time a French colony.

It is true that the general colonial law of Europe has created a monopoly, from which other countries are generally precluded; at the same time, laws respecting colonies, and laws respecting trade in general, have always undergone some change and relaxation after the breaking out of hostilities. It is necessary that it should be so, with regard to the rights of neutral nations; because, as war cannot be carried on between the principal powers of Europe, in such a manner as to confine the effects of it to themselves alone, it follows that there must be some changes and variation in the trade of Europe; and it cannot be said that neutrals may not take the benefit of any advantages that may offer from these changes—because, if so, it would lead to a total destruction of neutral trade; if they were to suffer the obstructions in their old trade, which war always brings with it, and were not permitted to engage in new channels, it would amount to a total extinction of neutral commerce. Such a position, therefore, cannot be maintained, that they may not avail themselves of what is beneficial in these changes, in lieu of what they must necessarily suffer, in other parts of their trade, in time of war. It is not meant that they should be entirely set at liberty from all the restrictions of peace,—that would be going too far; but that, as there has been a regular course of

relaxations, as well in our navigation laws as in the colonial trade, in admitting importations and exportations not allowed in time of peace, it seems not to be too much to say, that, if they have been regularly relaxed in former wars, neutral merchants may think themselves at liberty to engage in it, in any ensuing war, with impunity; and it does not justify a presumption, that, as a belligerent country allows a change in its own system as necessary, and invites neutrals to trade in its colonies under relaxations, so it would allow them to trade, in the same manner, with the colonies of the enemy. It may be said that the strict principle of war is, to do all possible mischief to your enemy, and destroy his resources and trade as much as you can: this may be true in theory, but it must be understood only as the strict theoretic principle which, in practice, is limited by other considerations, and by the rights of other parties; the whole trade of the enemy cannot be destroyed without the greatest injury to neutral nations, therefore this right against the enemy must be limited, in some degree, by the rights of neutral trade. If you can find, indeed, a trade wholly and exclusively confined to the enemy, that is the point on which it is lawful for you to strike; that was the rule and the foundation of the principles set up in 1756; the state of the colonies at that time justified it—the system remained entire—and as long as the colonial trade remained an exclusive trade, that was the point on which it was lawful to strike; but, since that time, relaxations have been regularly admitted; at the commencement of the last war it was so allowed to be, and on that account the same principle was not enforced: the principle might not be abandoned, but the fact being that the French had opened their ports, the principle was not applied. In the same manner, the French have opened their ports in this war, and various relaxations have been admitted; it is now held to be an allowable trade from a neutral country to the colony of a belligerent. The war commenced with a general prohibition in the instructions of November, 1793, and all vessels were directed to be taken that were carrying supplies to the colonies of the enemy, or bringing produce from them; but these were relaxed in January, 1794, and other instructions issued of narrower extent. It was then directed to bring in those vessels that were carrying West India produce from the West India Islands to Europe, and those that appeared to be going to such islands in the West Indies as were under blockade. This seems to be the only restriction on trade to the West India Islands, that it

should not be going to islands under blockade; this order continued in force four years, till the restriction was still further taken off by allowing neutral vessels to carry West India produce to Europe, either to our ports or to the ports of their own country. It is not asserted that the whole of the colonial trade is laid open by these relaxations, or that a neutral ship might go from a port of France to a colony and back again to France—making one whole and entire transaction; in that case the returns would be projected before the voyage began; and that, it must be allowed, would be only the trade of the enemy on increased freight. But as to separate voyages the matter is very different, as well in regard to the nature and effect of the trade itself as to the terms of the instructions respecting it:—the legality of the trade homeward from the colony to France is a question at present suspended before the Lords; and such a trade might be construed to fall within the scope of the King's instructions, although it is not so affirmatively expressed; but this trade outward to the colony cannot, by any implication, come within the terms of the instruction. It remains, then, only to inquire, whether there is anything in the nature of it that should induce the Court to consider it as illegal? It cannot be illegal on the ground that it is not legal for the neutral to go to the colony of the enemy, because he is now allowed to go from his own port; therefore the same supplies may be afforded. It cannot be, that he assists the enemy by taking articles from the mother country; that he might do circuitously, by going to his own country first, with equal advantage to the mother-country in respect to its revenues arising from duties. On these grounds it cannot be illegal; neither is it made so by notification, or in the King's instructions to his cruisers. With respect to authorities, it cannot be expected that there should be any. The question has not arisen in this war, or it would not be to be discussed so much at length in the present case. During the last war there could not arise any precedent, as there was then a general relaxation. But there is a case of *The Verwagteg* (1 C. Rob. 300, cited), in 1780, where freight was given to a neutral ship going from Marseilles to a French colony and back; from which it appears that, whilst neutrals were admitted generally to partake in the colonial trade, it was not thought to afford any ground of distinction that they were going from a French port.

SIR WM. SCOTT.—This is the case of a ship taken on a voyage

originally from Hamburg, first to Bordeaux, where she discharged part of her cargo, and having taken on board other goods, proceeded to the colony of St. Domingo, and was taken in this period of the voyage. The first point made on the part of the claimants is, that St. Domingo is not to be considered as a French colony, but as in a state of independence; and a second point made is, that even if it were considered as French, yet as the English have themselves traded with that island, this must be deemed a permission to the subjects of neutral countries to do the like.

In proof of the former allegation, an attempt was made to introduce extracts from the common English newspapers, which the Court would not permit to be read; 'The Gazette' is the only authority of this species admitted and respected by the Court for reasons too obvious to require a particular notice. From other more legitimate evidence than any contained in unauthorized publications of that nature, I think it is legally to be held that St. Domingo continues a French colony. It appears that a direct commercial correspondence and communication is carried on between France and that island, which could hardly be if it was deemed to be in a state of revolt and disruption from the mother-country; the French custom-house ordinances and regulations appear all to be in full force there; ships go certificated and bonded as upon the former system; and if there are parts of the island not under French dominion, it does not at all appear that it was in the view of the present parties to trade with those parts exclusively.

Upon the second preliminary point, viz. that an English trading with this French colony must, at all events, be deemed an authorization of the same trade to the subjects of other countries, I have only to observe, that it might be admitted to have that effect, if the fact were true in the degree necessary to support the conclusion. The matter of illegality imputed to the present claimants is a direct trading between the mother-country of the enemy and his colony, a lending of themselves to the purpose of a direct communication between the two. To show that Englishmen have traded to St. Domingo, and under the authority of their government, is not showing enough, unless it is likewise shown that they had, under that authority, lent themselves to be the instruments of a direct commercial correspondence between France and its colony; a trading between the dominions of Great Britain and St. Domingo could authorize no more than a trading between the neutral country itself and that colony.

On the other hand, it has been pressed against the claimants, that some part of the cargo which came from Hamburg and was discharged at Bordeaux was contraband, and being the property of the same persons would affect the goods which travelled with them from Hamburg, and were proceeding onwards to their ultimate destination of St. Domingo. The goods which are charged to be of the nature of contraband are hemp, or some similar substance under another name fit for the manufacture of ropes. As these commodities are not now remaining on board the ship, they cannot become the subjects of any inspection, which the Court could order for the purpose of ascertaining their real nature and probable use. It is argued indeed, that the claimants' agents at Bordeaux speak in a letter of their expectation that the rope-makers employed by the government at that place would purchase them; but it does not appear that these persons had themselves seen the articles, or that they had anything more than a general hope that the goods might find a vent of that kind. On the other hand, it appears that these goods had been inspected by a British man-of-war at Dover, when the ship put in there in the course of her voyage to Bordeaux; there is reason to presume that the search was not made in a perfunctory manner; it was made in a harbour where a search could be conveniently made, and by persons generally sincere enough in their desire to make such searches effectual. The inference is that they were not of a contraband nature; at best it is left ambiguous, and without any particular means remaining of affording a certainty upon the matter. If so, it is useless to inquire what the effect of contraband in such circumstances would have been. I shall say no more, than that I incline to think that the discharge of the goods at Bordeaux would have extinguished their powers of infection. It would be an extension of this rule of infection not justified by any former application of it to say, that after the contraband was actually withdrawn, a mortal taint stuck to the goods with which it had once travelled, and rendered them liable to confiscation, even after the contraband itself was out of its reach.

Another consideration was likewise pressed against these goods; that having been entered at Bordeaux, and exported from thence, it must be deemed an actual exportation from that port, and consequently that they are liable to be treated legally in the same manner (whatever that manner may be) as the goods first put on board at Bordeaux. I incline to think that this would be much too rigorous an application of principles, rather belonging to the

revenue law of this kingdom—a system of law having little in common with the general prize law of nations; and that these goods are entitled to be considered as coming from Hamburg, the original place of their shipment; and former decisions having fully established that a direct commerce from a neutral country to a French settlement was open, I decree restitution of these goods, which all appear to be neutral property.

Upon the mere question of property, as it respects all the goods as well as the ship, I see no reason to entertain a legal doubt. Considering them as neutral property, I shall proceed to the principal question in the case, viz.:—*Whether neutral property engaged in a direct traffic between the enemy and his colonies, is to be considered by this Court as liable to confiscation?* And first with respect to the goods.

Upon the breaking out of a war, it is the right of neutrals to carry on their *accustomed trade*, with an exception of the particular cases of a trade to blockaded places or in contraband articles (in both which cases their property is liable to be condemned), and of their ships being liable to visitation and search; in which case, however, they are entitled to freight and expenses. I do not mean to say, that in the accidents of a war the property of neutrals may not be variously entangled and endangered; in the nature of human connections it is hardly possible that inconveniences of this kind should be altogether avoided. Some neutrals will be unjustly engaged in covering the goods of the enemy, and others will be unjustly suspected of doing it; these inconveniences are more than fully balanced by the enlargement of their commerce; the trade of the belligerents is usually interrupted in a great degree, and falls in the same degree into the lap of neutrals. But without reference to accidents of the one kind or other, the general rule is that the neutral has a right to carry on, in time of war, his *accustomed trade* to the utmost extent of which that *accustomed trade* is capable. Very different is the case of a trade which the neutral has never possessed, which he holds by no title of use and habit in time of peace, and which, in fact, can obtain in war by no other title than by the success of the one belligerent against the other, and at the expense of that very belligerent under whose success he sets up his title—and such I take to be the colonial trade, generally speaking.

What is the colonial trade generally speaking? It is a trade generally shut up to the exclusive use of the mother-country to which the colony belongs, and this to a double use: that of supply-

ing a market for the consumption of native commodities, and the other of furnishing to the mother-country the peculiar commodities of the colonial regions. To these two purposes of the mother-country the general policy respecting colonies belonging to the states of Europe has restricted them. With respect to other countries, generally speaking, the colony has no existence. It is possible that, indirectly and remotely, such colonies may affect the commerce of other countries. The manufactures of Germany may find their way into Jamaica or Guadaloupe, and the sugar of Jamaica or Guadaloupe into the interior parts of Germany; but as to any direct communication or advantage resulting therefrom, Guadaloupe and Jamaica are no more to Germany than if they were settlements in the mountains of the moon; to commercial purposes they are not in the same planet. If they were annihilated it would make no chasm in the commercial map of Hamburg. If Guadaloupe could be sunk in the sea, by the effect of hostility, at the beginning of a war, it would be a mighty loss to France, as Jamaica would be to England if it could be made the subject of a similar act of violence; but such events would find their way into the chronicles of other countries as events of disinterested curiosity, and nothing more.

Upon the interruption of a war, what are the rights of belligerents and neutrals respectively, regarding such places? It is an indubitable right of the belligerent to possess himself of such places, as of any other possession of his enemy. This is his common right; but he has the certain means of carrying such a right into effect, if he has a decided superiority at sea. Such colonies are dependent for their existence as colonies on foreign supplies. If they cannot be supplied and defended, they must fall to the belligerent, of course; and if the belligerent chooses to apply his means to such an object, what right has a third party, perfectly neutral, to step in and prevent the execution? No existing interest of his is affected by it; he can have no right to apply to his own use the beneficial consequences of the mere act of the belligerent, and to say: "True it is, you have, by force of arms, forced such places out of the exclusive possession of the enemy, but I will share the benefit of the conquest, and, by sharing its benefits, prevent its progress. You have in effect, and by lawful means, turned the enemy out of the possession which he had exclusively maintained against the whole world, and with whom we have never presumed to interfere; but we will interpose to prevent his absolute surrender, by the means of that very

opening which the prevalence of force of arms alone has effected. Supplies shall be sent, and their products shall be exported. You have lawfully destroyed his monopoly, but you shall not be permitted to possess it yourself; we insist to share the fruits of your victories; and your blood and treasure have been expended, not for your own interest, but for the common benefit of others."

Upon these grounds, it cannot be contended to be a right of neutrals to intrude into a commerce which had been uniformly shut against them, and which is forced open merely by the pressure of war; for when the enemy, under an entire inability to supply his colonies and to export their products, affects to open them to neutrals, it is not his will, but his necessity, that changes his system; that change is the direct and unavoidable consequence of the compulsion of war; it is a measure, not of French councils, but of British force.

Upon these and other grounds, which I shall not at present enumerate, an instruction issued at an early period for the purpose of preventing the communication of neutrals with the colonies of the enemy—intended, I presume, to be carried into effect on the same footing on which the prohibition had been legally enforced in the war of 1756—a period when, Mr. Justice *Blackstone* observes, the decisions on the law of nations proceeding from the Courts of Appeal were known and revered by every state in Europe.

Upon further inquiry, it turned out that one favoured nation, the Americans, had in times of peace been permitted, by special convention, to exercise a certain very limited commerce with those colonies of the French, and it consisted with justice that that case should be specially provided for; but no justice required that the provision should extend beyond the necessities of that case. Whatever goes beyond, is not given to the demands of strict justice, but is matter of relaxation and concession.

Different degrees of relaxation have been expressed in different instructions, issued at various times during the existence of the war. It is admitted that no such relaxation has gone the length of authorizing a direct commerce of neutrals between the mother-country of the enemy and its colonies, because such a commerce could not be admitted without a total surrender of the principle; for allow such a commerce to neutrals, and the mother-country of the enemy recovers, with some increase of expense, the direct market of the colonies and the direct influx of their productions. It enjoys, as before, the duties of import and export, the same

facilities of sale and supply, and the mass of public inconvenience is very slightly diminished. Even supposing that this trade is carried on with integrity (which it is difficult to hope, under all the temptations and opportunities of fraud which a direct intercourse will supply), there is every reason to believe that the ancient monopoly will, in effect, revive itself without the aid of exclusive prohibitions. The force of long-established connection and of ancient habits of trade would in a great measure preserve for a time to the mother-country its ancient exclusive commerce with colonies, although the communication might be legally open to the merchants of other countries.

Much argument has been employed on grounds of commercial analogy: *this trade* is allowed; *that trade* is not more injurious. *Why not that* to be considered *as equally permitted*? The obvious answer is, that the true rule to this Court is the text of the instructions; what is not found therein permitted is understood to be prohibited, upon this plain principle, that the colony trade is generally prohibited, and that whatever is not specially relaxed continues in a state of interdiction. The utmost that could be contended would be, that a commerce exactly *ejusdem generis et gradus* would be entitled to the favour of the permission; but the relaxation is not to be extended by construction, particularly where authority has been gradual in its relaxation. Where it has distinguished, and stopped short in several stages, individuals have no right to go further, upon a private speculation of their own, that authority might as well have gone further. It is argued that the neutral can import the manufactures of France to his own country, and from thence directly to the French colony. Why not *immediately* from France, since the same purpose is effected? It is to be answered, that it is effected in a manner more consistent with the general rights of neutrals, and less subservient to the special convenience of the enemy. If a Hamburg merchant imports the manufacture of France into his own country (which he will rarely do if he has like manufactures of his own, but which in all cases he has an uncontrollable right to do), and exports them afterwards to the French colony—which he does, not in their original French character, but as goods which, by importation, had become a part of the national stock of his own neutral country—they come to that colony with all the inconvenience of aggravated delay and expense. So, if he imports from the colony to Hamburg, and afterwards to France, the commodities of the colony, they come to the mother

country under a proportionate disadvantage ; in short, the rule presses upon the supply at both extremities, and, therefore, if any considerations of advantage may influence the judgment of a belligerent country in the enforcement of the right, which upon principle it possesses, to interfere with its enemy's colonial trade, it is in that shape of this trade that considerations of this nature have their chief and most effective operation.

It is an argument rather of a more legal nature than any derived from these general topics of commercial policy, that variations are made in the commercial systems of every country, *in wars and on account of wars*, by means of which neutrals are admitted and invited into different kinds of trade, from which they stand usually excluded ; and, if so, no one belligerent country has a right to interfere with neutrals for acting under variations of a like kind made for similar reasons in the commercial policy of its enemy.

And certainly if this proposition could be maintained without any limitation, that wherever any variation whatever is made during a war, and on account of the state of war, the party who makes it binds himself in all the variations to which the necessities of the enemy can compel him, the whole colony trade of the enemy is legalized ; and the instructions which are directed against any part are equally unjust and impertinent ; for it is not denied that some such variations may be found in the commercial policy of this country itself, although some that have been cited are not exactly of that nature. The opening of free ports is not necessarily a measure arising from the demands of war ; it is frequently a peace measure in the colonial system of every country ; there are others which more directly arise out of the necessities of war. The admission of foreigners into the merchant service, as well as into the military service of this country ; the permission given to vessels to import commodities not the growth, produce, and manufacture of the country to which they belong, and other relaxations of the Act of Navigation, and other regulations founded thereon ; these, it is true, take place in war, and arise out of a state of war ; but then they do not arise out of the predominance of the enemy's force, or out of any necessity resulting therefrom ; and that I take to be the true foundation of the principle. It is not every convenience, or even every necessity arising out of a state of war, but that necessity which arises out of the impossibility of otherwise providing against the urgency of distress inflicted by the hand of a superior enemy, that can be admitted to produce such an effect. Thus in time of war every

country admits foreigners into its general service; every country obtains, by the means of neutral vessels, those products of the enemy's country which it cannot possibly receive either by means of his navigation or its own. These are ordinary measures to which every country has resort in every war, whether prosperous or adverse. They arise, it is true, out of a state of war, but are totally independent of its events, and have, therefore, no common origin with these compelled relaxations of the colonial monopoly; these are acts of distress, signals of defeat and depression; they are no better than partial surrenders to the force of the enemy, for the mere purpose of preventing a total dispossession. I omit other observations which have been urged, and have their force; it is sufficient that the variations alluded to stand upon grounds of a most distinguishable nature.

Upon the whole view of the case, as it concerns the goods shipped at Bordeaux, I am of opinion that they are liable to confiscation. I do not know that any decision has yet been pronounced upon this subject; but till I am better instructed by the judgment of a superior tribunal, I shall continue to hold that *I am not authorized* either by general legal principles applying to this commerce, or by the letter of the King's instructions, *to restore goods, although neutral property, passing in direct voyages between the mother-country of the enemy and its colonies.* I see no favourable distinction between an *outward* voyage and a *return* voyage. I consider the intent of the instruction to apply equally to both communications, though the return voyage is the only one specifically mentioned.

The only remaining question respects the ship; it belongs to the same proprietors, and if the goods could be considered as properly contraband, would on that account be liable to confiscation, for in the case of clear contraband this is the clear rule. I incline to apply a more favourable one in the present case. It is a case in which a neutral might more easily misapprehend the extent of his own rights; it is a case of less simplicity, and in which he acted without the notice of former decisions upon the subject. The ship came from Hamburg in the commencement of the voyage; she was not picked up for this particular occasion, but was intended to be employed in her owner's general commerce. Attending to these considerations, I shall go no further than to pronounce for a forfeiture of freight and expenses, with a restitution of the vessel.

[Part of the] cargo, taken in at Bordeaux, condemned, [and the remainder of the cargo and] ship restored, without freight.

THE WHILELMINA, OTTO.

26th November, 1801.

[REPORTED 4 C. ROB. APPEND. P. 4.]

COLONIAL TRADE OF ENEMY—RULE OF WAR OF 1756.]—*Neutrals are not at liberty to engage in a trade with the colony of the enemy in time of war, which is not permitted to foreign vessels in time of peace. A Danish vessel was taken July, 1798, on a voyage from a colony of Spain to a port of Europe, not being a port of Great Britain nor of the country to which either the ship or cargo belonged. Held, as the voyage was not protected by any relaxation of the rule derived from the instructions for the war, the ship and cargo were liable to confiscation.*

A Danish vessel, taken July, 1798, on a voyage from La Guayra to Leghorn, and carrying a cargo of colonial produce, claimed for merchants of Bremen. From the discussion of this case may be stated most of the topics of argument applicable to the general question.

On the part of the claimant, it was contended that whatever authority might be ascribed to the decisions in the war in 1756, they did not by any means determine the question now before the Court. They were cases of neutral vessels going to the colonies of France, at first under special licenses and certificates of permission from the government of France; which rendered them liable to be considered as adopted French ships. Though the same course of decisions continued during that war, after the licenses had been laid aside, it was on the same view of things that the fact of *special permission* was equally notorious; the trade itself being in direct departure from the restriction, which had heretofore invariably excluded all foreign vessels from the colonial trade of France. It was therefore a rule, not laid down at that time so broadly as to comprehend all trade with the colonies of the enemies generally, but founded on the special fact of the previous restriction of the French system. From this circumstance arose a material distinction in favour of the present case. No such restrictions have been

shown to be common to the colonial system of Spain. On the contrary, in that same war, a class of cases were uniformly restored in which produce brought immediately from Monte Christi was proved to have come *originally* from the Spanish ports of St. Domingo, while the produce taken from the same place of general deposit, but coming originally from the French possessions, were condemned. So long ago therefore as the war of 1756, neutral traders appear not to have been precluded from purchasing the produce of the colonies of Spain in the West Indies. In the same manner, before the date of the present hostilities with Spain, a direct intercourse had been permitted to English vessels and ships of other nations. The fact, therefore, on which the old rule is founded, totally fails. A material difference presents itself also in respect to the motives under which the rule has been established. Originally, the pretensions *to exclude all neutrals* was uniformly applied on the part of the belligerent; by which the effect of reducing such settlements, for want of supplies, became a profitable issue of war: *now*, since the relaxations have conceded to neutral merchants the liberty of carrying thither cargoes of innoxious articles, and also of withdrawing the produce of the colony for the purpose of carrying it to their own ports—*now*, to restrict them from carrying such cargoes *directly to the ports of other neutral states*, becomes a rule, apparently capricious in its operation, and one of which the policy is not so evident. From the northern nations of Europe no apprehensions are to be entertained of a competition injurious to the commercial interests of our own country. To exclude *them* from this mode of traffic in the produce of the enemy's colonies, is to throw a further advantage into the hands of the American merchants, who can with greater ease import it first into their own country, and then send it on by *re-exportation*—a course of trade which affords no means of detecting whether such re-exportation is in fact a fair transaction, originating in fresh speculations on commodities already imported and become part of the national stock—or whether it is only a fraudulent mode of concealing the continuance of the first *illegal* destination.

Taking the present case, therefore, to be entirely beside the principle of those precedents of 1756, and free from any mischief intended to be guarded against by that train of decisions, putting these precedents out of the question—From what quarter is the law of condemnation to be derived? In the American war no obstruction was given to a free trade with the colonies of Spain.

The instructions which have issued during this present war contain no such rule; in those of 1793 and 1794 the Spanish colonies were not mentioned; those of 1798 are scarcely applicable to this transaction in point of time, but even they prescribe no rule of condemnation to the Court. They direct only "the bringing in," leaving it to the Court to apply the rule of decision that should be fairly deducible from the law of nations. No such rule has ever yet been applied to trade with the colonies of Spain. If it were deemed fit and proper to establish such a rule, it is equitable at least that there should be some notification before it can be enforced to the confiscation of valuable property, which neutral merchants may reasonably think themselves at liberty to employ in a trade not pronounced illegal, either by public declaration or by the antecedent practice of this Court.

On the part of the captors.—The question in this case is, whether ship and cargo were engaged in a lawful trade, being taken on a voyage from the colony of Spain to a port in Europe, not being a port of this kingdom nor of the country to which either ship or cargo belongs? If that cannot be maintained, the penalty of confiscation will follow, not from any particular instruction, but under the general law of nations; which, when it has distinguished what is an unlawful trade in time of war, inflicts the penalty of confiscation, as the sanction by which alone the principles of that species of law are to be enforced. If it were by the instructions alone that this question was to be decided, there might be some ground for demanding from whence the penalty of confiscation is derived; since they make no mention of it. The important fact however is, that the instructions *do not constitute the law*; they have none of the characteristics that would accompany them if they had been so intended; they neither specify the punishment nor describe the several situations to which the penalty of confiscation has been already applied; they contain nothing relative to a trade to the colonies, which has however, both in this Court and in the Court of Admiralty, been considered as falling equally within the penalty of the law. (2 C. Rob. 208.) The instructions are *not* circulated to foreign states by general notification, nor were delivered to our own cruisers; they are, therefore, manifestly deficient in the essential qualities of a law, and are to be taken only as so many declarations of the degree in which the executive government is, from time to time, disposed to remit some part of the full right accruing under the general principle of law. To what then can the

Court look for its authority on this subject better than to the decisions of this Board on the very same question presenting itself in the year 1756? At that period there were no instructions in which the principle was laid down; yet then the Court did not hesitate to come to a conclusion on the illegality of such a trade.

The general rule that neutrals cannot legally trade to the colonies of belligerents, is indeed deducible from the most clear and admitted principles of the law of nations; a belligerent has a right, so far as his enemy only is concerned, to distress, and even to annihilate the commerce of the enemy. That right is, however, restricted by another belonging to neutral nations, viz. the right to carry on *their accustomed trade*. But the colonial trade being a branch of commerce from which neutrals are excluded in time of peace, they can suffer *no injury* by not being allowed to engage in it during hostilities. On the contrary, it is their known duty to abstain from such a trade; inasmuch as it is an obvious and undoubted principle of general law that neutrals are not to interpose in war, so as to afford to one enemy a manifest aid or relief from the pressure of his adversary—*hostem hosti imminenti eripere*. This is as an admitted principle in respect to its intrinsic fitness and propriety, whatever difference of opinion may sometimes arise, as to the particular circumstances which are necessary to warrant the application of it. In many instances indeed, it may be difficult to discriminate between the trade assumed by neutrals in *consequence of war*, and the ordinary state of their commerce. But the universal principle of restriction on which the colonial system of Europe is built, puts the question of fact on this point beyond all doubt.

The principle of monopoly¹ is as evident and notorious as the existence of the colonies themselves. If, under this system, neutrals are, without injustice and without complaint on their part, rigorously excluded in time of peace, on what ground can they claim to be admitted in time of war, merely in consequence of the distress felt or apprehended from the arms of the adversary? The produce of the colonies is become a most important article of national resource to nations possessing such establishments. The supply to be afforded to the colonies is also essential to their preservation. The interruption of this intercourse operates to destroy these resources, as well as to compel the surrender of these pos-

¹ Since the time when this judgment was delivered, the monopoly in the trade of the colonies has to a great extent been abolished by most European nations.

sessions, in which it is that maritime states are most vulnerable. Out of this distinguishing and peculiar character of the colonial trade, the general principle has grown, that neutrals are not at liberty to interpose in it in time of war. But, it is said, "*there have been relaxations*, and it is therefore not to be inferred that the old system would be again resumed without notice and public declaration." On the contrary, the *old rule* is to be taken as the standing principle, from which no relaxations are to be presumed or extended, beyond the fair meaning of the terms in which they are conveyed. The relaxation as to France, during the American war, stood upon the peculiar ground of an asserted change of system, which proved afterwards to be but a fallacious and temporary expedient.¹ As to the Spanish colonies in that war, Spain was scarcely engaged in that war long enough to bring them under consideration. In the present war, instructions have issued imparting a measured relaxation of the principle, as far as particular considerations seemed to require. Since none of these extend to the permission of a trade like the present, the consequence will be, that this transaction, deriving no protection from any of the instructions, falls back into the general law, and is by that subject to condemnation.

LORD CHANCELLOR LOUGHBOROUGH² delivered the judgment of the Court to the following effect:—The question in this case has been accurately stated to be, *whether the ship and cargo were taken in a lawful trade, going from a colony of Spain to a port of Europe, not being a port of this kingdom, nor of the country to which either the ship or cargo belongs?* In the course of the discussion, some observations have been thrown out upon the policy of applying any restriction to such a trade; but the question for this Court to consider is, not whether the Executive Government has done wisely in restraining the relaxations within certain limits, but whether, by the law of nations, this ship and cargo, not falling within the reach of these relaxations, are liable to confiscation. It has been

¹ In the same manner, after the termination of the late war, so early as the 21st December, 1801, public notice was given at the Havannah, and circulated in the American papers, "That neutral traders would no longer be admitted into that port." See also a letter of the Intendant

of Louisiana to the American States, 16th October, 1782:—"As long as it was necessary to tolerate the commerce of neutrals, which is now abolished." *Polit. Regist.* vol ii. p. 34.

² Afterwards Earl of Rosslyn.

disputed also, "whether, by the colonial system of Spain, a foreign merchant might not have been permitted to engage in such a trade in time of peace?" On this fact the Court is disposed to hold it to be notorious, that such a trade would *not* have been allowed. It was the duty of those proposing to derive any benefit from such a permission to have proved it to have existed; that not having been done, the Court thinks itself justified in holding as a notorious fact, that such a trade in time of peace would not have been permitted. The question is, then, whether property taken in such a voyage is liable to confiscation? It has been repeatedly determined at this Board, *that neutrals are not at liberty to engage in a trade with the colony of the enemy, in time of war, which is not permitted to foreign vessels in time of peace.* Although the instructions of 1793 could not be said to make property so engaged liable to confiscation, if it were not so by the general law, it will not be too much to attribute to those instructions to say, that they are to be taken as proof that the government of this country understood such to be the law of nations at the time when those instructions issued. From the conduct of France, also, in opening the ports of her colonies a short time previous to the breaking out of the American war, for the purpose of avoiding the application of this principle, it is manifest that the principle itself was thoroughly understood by that government to be agreeable to the law of nations.

Taking the rule, then, to proceed from a known principle of public law, the question will be, whether there have been any such relaxations of the general rule as will embrace the circumstances of this case. To the practice of the last war it is needless to advert, since *that* rested solely on the peculiar circumstances, which have been before hinted at, in the conduct of France. If any protection can be derived from the instructions of the present war, it must be from those of 1794 or of 1798. If neither of these can be said to apply, the consequence will be that the case, falling under the general rule, will be liable to confiscation.

By the instructions of 1794, it is not easy to conceive how any protection can be afforded to this cargo. It has indeed been urged, in way of argument, that the colonies of Spain are not mentioned in those instructions. On that circumstance it is observable, as far as it can be thought to operate favourably for the present case, that it was at least obvious to expect that the same principle which was applied to the colonies of France, would also be applied to other countries becoming enemies, and holding colonies and settlements

of a similar nature. Without dwelling, however, on that argument, it is more important to observe, that it is not the instructions which impose the penalty of confiscation,—they only direct cruisers to bring in “for legal adjudication;” and then the question arises, *Whether, under the law of nations, the penalty of confiscation does not attach?* If the instructions of 1794 do not protect property taken in such a course of trade; if those of 1798 are to be referred to, *they* expressly direct “the bringing in of ships coming with the produce of any colonies or settlement of France, Spain, or the United Provinces, to any port of Europe, not being a port of this kingdom, nor a port to which the ship belongs.” This is the case of a Danish ship going from La Guyara to Leghorn with a cargo, the produce of the Spanish settlement, and claimed for merchants of Bremen. It is, therefore, a case not included in the relaxations of either of these instructions, but falling under the general law. It has already been pronounced to be the opinion of this Court, that, *by the general law of nations, it is not competent in neutrals to assume, in time of war, a trade with the colony of the enemy, which was not permitted in time of peace*; and, under this general position, the Court is of opinion that this ship¹ and cargo are liable to confiscation. On the authority of this decision several cases² were determined of similar voyages, subsequent to the in-

¹ On this part of the judgment, it is to be observed that the terms apply as well to the ship as to the cargo; and in the printed case of the appellant, the ship was by mistake represented as *condemned*, and as forming part of the appeal. In the sentence of the Court below, however, the ship was restored, and there does not appear to have been any appeal from that part of the sentence on the part of the captor. So in the case of *The Jonge, Thomas*, Lords, November, 1801, 3 C. Rob. 283 n. although the terms of the Court were general, attaching as well on the ship as on the cargo, yet that voyage having been of ambiguous origin, commencing at Amsterdam, but touching at Emden, it was not precisely a judgment on a ship going singly from a neutral country to the colonies of the enemy. Owing to these circumstances in *The Nancy, Benjamin*, December 19, 1803, an Ame-

rican ship going from La Guyara to Hamburg, it was for some time disputed whether the Court had, in any precedent, pronounced the penalty of confiscation on the ship in such a voyage, or whether the favourable distinction admitted by the Court of Admiralty in *The Minerva*, 3 C. Rob. Adm. Rep. 232, was not to be applied. The Court was strongly impressed with a notion that the penalty had been enforced, holding it clearly to be within the same principle. In advertent to other cases (*Volant, Bessom*, December, 1801) determined after *The Whilelmina* on the authority of that case, it appeared that in several the ship had been condemned. The principle was accordingly understood to extend to the ship as well as the cargo.

² *Volant, Bessom*, and other cases, December, 1801.

structions of 1793. At the same time, a class of causes was reserved for further argument, in which the whole transaction had taken place *prior to the issuing of the instructions of Nov. 1793*. In the case of *The Charlotte, Coffin*, an American vessel, taken on a voyage from Cayenne to Bordeaux, October, 1793, the matter came again under discussion. On the part of the claimants, it was argued that however sound the principle might be of not permitting neutrals in time of war to engage in any trade with the colonies of the enemy which was not permitted in time of peace, it was not so obvious and known in practice as to fix on neutral merchants an obligation of presuming "that it would necessarily be re-established at the commencement of this war," in opposition to the intermediate practice that had prevailed. Vessels engaging in such a trade, prior to any declaration of the belligerents, stood on a much more favourable footing than those so employed after the instructions of 1793, since those instructions contained an admonition to neutral merchants to abstain from such a trade as was then marked out as a *just cause of seizure at least*. On this distinction it was contended that, considering the changeable ground on which the principle was first established in 1756, and the apparent abandonment of it during the last war, there was enough to entitle the claimant to the benefit of a justifiable ignorance, to protect this property from confiscation.

On the other side it was contended, by arguments which have been consolidated in the argument of the preceding case, that the principle was sufficiently obvious, as a principle of public law, without any instructions; that relaxations were to be confined to the circumstances of the war that had given rise to them, and that neutrals were not to presume they would be continued. On the 29th March, 1803, the Court of Appeal pronounced the ship and cargo subject to condemnation: by the same judgment also were condemned *The Jerusha, Giles*, and *The Betsey, Kinsman*,—cases under similar circumstances as to the time of capture, and reserved on the same question.

By these decisions, the *illegality* of voyages from the colonies of the enemy to neutral ports in Europe, not being the ports of the proprietors of the ship or cargo nor a port of this kingdom, is fully established.

On the same principle in *The Lucy, Glover*, 18th May, 1802, a Swedish ship and cargo, taken 1799 on a voyage from a French colony to a *port of America*, was pronounced subject to condemna-

tion. In this case a reference had been made to the case of *The Sally, Hess*, and *The Hector, Smith*, American ships, taken on a voyage from a French colony in the West Indies (St. Domingo) to the neutral island of St. Thomas, and restored.

Judgment was pronounced by the Master of the Rolls (Sir *William Grant*) to the following effect:—In *The Sally, Hess*,¹ the Court thought they were going further than they should have been disposed to go if it had not been for the authority of *The Hector, Smith* (5th July, 1800). Now we are required to go further. In neither of those cases was the produce of the colonies carried out of the West Indies. If an American vessel would not be permitted to trade from St. Domingo to Sweden, there can be no reason why the same rule should not be applied to a Swedish vessel trading between the colony of the enemy and America.—Condemned.

“On the illegality of the trade of a neutral between the colony and the parent state of the enemy,” writes Sir *C. Robinson*, “a solemn decision has been pronounced in

the Court of Admiralty in the case of *The Immanuel*. In that case the Judge entered much at length into the nature of colonial establishments, and adverted to the

¹ In *The Sally, Hess* (Lords, December 10, 1801), an American ship taken on a voyage from St. Domingo to St. Thomas in 1794, it had been contended that it was not a case within the instructions of 1794, by which the former and more extensive prohibition in the instruction of 1793 had been revoked, before the commencement of this transaction; that the instructions of 1794 directed only the bringing-in “of ships bound to Europe;” that the produce in this instance was not carried out of the West Indies; and that there had been a similar case in 1800, *The Hector, Smith*, taken on a voyage from a French colony to St. Thomas, in which the Court had decreed restitution.

On the part of the captor it was contended, in conformity to the general argument, that no instructions were necessary to establish the illegality of a trade like the present, not permitted in time of

peace; that if such a distinction as was here advanced could be allowed, it would tend to establish a dépôt in the neutral island of St. Thomas or St. Croix, from whence a trade might be carried on to any part of the world, entirely frustrating the restraints that had been pronounced still to attach on a trade with the colonies of the enemy.

The judgment of the Court was pronounced by the Master of the Rolls to the following effect:—It appears that in *The Hector, Smith*, taken on a voyage similar to that in the present case, from a French colony to St. Thomas, restitution took place; and in other cases it has been the intimation of persons composing this Board, that such a voyage was not illegal. Under these precedents, the Court is disposed to think there must be restitution, whatever might be our own opinion, if the question were *res integra* before us.

prohibition intimated in the first instructions of 1793 as the rule to be applied in all cases which did not fall within the reach of any relaxation. In that case a cargo taken in at Bordeaux to be carried to St. Domingo, as asserted, on the actual account and risk of neutral merchants, was condemned on the question of law. . . . In the variety of cases transmitted to the Court of Appeal from the Courts of Vice-Admiralty, *other* questions have arisen which have carried the discussion of this subject considerably further. The *leading* judgment that has been delivered on these questions in the Court of Appeal, was in the case of *The Whilelmina, Otto*." See 4 C. Rob. App. A. p. 3.

Although in discussing the questions in the principal cases, it was fully admitted that neutrals with the exception of being excluded from trade to blockaded places, and in contraband of war, and being liable to visitation and search, have a right to carry on their *accustomed* trade, it is laid down as a rule forming part of the general law of nations, "*that neutrals are not at liberty to engage in a trade with a colony of the enemy in time of war, which was not permitted to foreign vessels in time of peace.*"

This rule is usually termed "the rule of the war of 1756;" "because," says a learned author, "in the war of 1756, commonly called the Seven Years' War, the French, finding themselves worsted at sea, and unable from our maritime superiority to carry on their colonial

trade themselves, repealed their old exclusive laws which restricted foreigners from prosecuting the trade between France and the French colonies, and opened this trade to the ships of the neutral powers. But Great Britain denied that neutrals could have any right to enter upon such a traffic, which was a direct interference with her maritime rights, as it might enable colonies to hold out that would otherwise fall into her power; and might enable France to withdraw seamen from her merchant service to man her fleet, who would otherwise have been obliged to be engaged in the colonial trade, or France would have risked the surrender of her colonies." Manning's Law of Nations, 196.

Notwithstanding its name, the rule appears to have been in operation previous to the year 1756. 2 Reddie, 446.

The true foundation for the rule appears in effect to be, that a neutral, by carrying on a trade between the colony and mother country in time of war from which he was excluded in time of peace, shows conclusively that he is trading not merely *with* but *for* the enemy, and therefore comes within the ordinary rule which subjects the property of the enemy to seizure and confiscation. And where neutrals are so treated, it is not by the interference of the belligerent with their trade, but with that of the enemy. Hence it has been laid down by Sir *Wm. Scott* that the trade between the colony and the mother-country in Europe,

being opened by the enemy for his own relief under the pressure of war, cannot innocently be undertaken by a neutral, nor without the hazard of rendering him liable to be considered as giving immediate aid and adherence to that belligerent to the unjust advantage of his adversary. See *The Nancy, Joy*, 3 C. Rob. 82, 83; *The Anne, Lord*, ib. 91, n.

Such a commerce will receive aggravation by an attempt to carry it on fraudulently, as under a mask of false papers showing a false destination (*The Nancy, Joy*, 3 C. Rob. 82, 83), and where it is carried on under concealment and with the aggravation of fraud, the party concerned clearly at once subjects himself to be considered as an enemy in all the consequences of that transaction (*The Phoenix, Susini*, 3 C. Rob. 186-191; and see *The Star*, ib. p. 193, n.); and it has been held that although it appears in evidence in the clearest manner that the cargo of a ship is neutral property, still if it be proved that the ship is going from the mother-country of the enemy to their colony under false papers and a false mask, and coming back again to the mother-country, she would be subject to confiscation. *The Calypso, Speck*, 2 C. Rob. 161.

The same principles have been held equally applicable in the case of a neutral going in a direct voyage from the mother-country of one enemy to the colony of another enemy allied in the war. *The Rose, Young*, 2 C. Rob. 206. So likewise if a neutral carries on

a trade between the settlement of one enemy and the colonial possession of an allied enemy. *The New Adventure*, 4 C. Rob. App. A. p. 4. in Lords, Nov. 26, 1801; *Oxolm*, ib. Lords, 11 March, 1802; *The Minerva, Andaulle*, 3 C. Rob. 229.

Where the original destination of a neutral vessel from a colony of the enemy to the mother-country has been diverted only in consequence of a *vis major*, which it was unable to resist, it will not be considered as a defeasance of the original illegality, any more than if the diversion had been occasioned by the temporary fury of the elements. For in both cases the original movement of the vessel must be considered; to which it must be presumed she would again immediately recur as soon as an opportunity presented itself. Thus in *The Minerva, Andaulle*, 3 C. Rob. 229 (March 20, 1801), a neutral ship on a voyage from Languera, a Spanish settlement, to Corunna, was taken by the French, and afterwards retaken by a British cruiser while on her voyage to a French port. It was held that such compulsory diversion did not defeat the illegality of the original voyage, and that whether the destination was to a Spanish or a French port it was immaterial. "An allusion," said Sir William Scott in his judgment, "has been made to the case of *The Imina, Bauman Vroom* (3 C. Rob. 167), in which the Court allowed to a party the full benefit of a deviation voluntarily made by the master upon receiving information in

the course of his voyage that Amsterdam was in a state of blockade. There it was deemed not unreasonable to allow the act of the master in changing his course a favourable operation respecting the cargo; considering that it was taken in a voyage no longer in the act of being prosecuted towards the enemy's country according to the intention of him to whom it had been confided. The Court presumed favourably that the owners would have approved of this deviation. But it would be going a great deal further to say that the act of foreign necessity, to which this vessel and cargo were giving a temporary submission, no longer than whilst they were compelled so to do, was to be considered as a total discontinuance and abandonment of the intended voyage on the part of the owners. The voyage of the ship and cargo when left to their own discretion would have continued the same, and must therefore be considered to be still existing *in law*, though controlled *in fact* by that overbearing necessity for the moment. But even giving the owners the benefit of a deviation compelled by the superior force of a party who stood in no relation of privity to them; yet this deviation being to a French port, it would be a voyage from the colony of an enemy to the mother-country of an allied enemy; which I have before held is attended with undistinguishable consequences as to the cargo."

If during peace other nations were allowed to trade with the

colonies of a belligerent, they would still be entitled to carry on their accustomed trade in time of war. *The Juliana, Carstens*, 4 C. Rob. 328.

With regard to the mode in which the general international law upon this subject has been in some instances either wholly waived or partially relaxed, a very useful account is given in a note by Sir *O. Robinson*. "During the war," he observes, "between England and America and the several powers of Europe that interfered to foment those differences, the principle was altogether intermitted, and on the ground that France had professed, a short time *before* the commencement of hostilities, to have *altogether* abandoned the principle of monopoly, and meant, as a *permanent regulation*, to admit neutral merchants to trade with the French colonies in the West Indies. The event proved the falsehood of that representation; but for a time the effect was the same. The Court of Admiralty of this country did not, during that war, apply the principle, or interrupt the intercourse of neutral vessels in that branch of commerce more than any other.

Soon after the commencement of the war of November 6, 1793, the first set of instructions that issued were framed, not on the exception of the American war, but on the antecedent practice; and directed cruisers "to bring in for lawful adjudication all vessels laden with goods the produce of any colony of France, or carrying

provisions or supplies for the use of any such colony." The relaxations that have since been adopted have originated chiefly in the change that has taken place in the trade of that part of the world since the establishment of an independent government on the continent of America. In consequence of that event, American vessels had been admitted to trade in some articles and on certain conditions with the colonies both of this country and of France. Such a permission had become a part of the general commercial arrangements, as the ordinary state of their trade in *time of peace*. The commerce of America was therefore abridged by the *foregoing instructions*, and debarred of the right generally ascribed to neutrals in time of war, that it may be continued, with particular exceptions, on the basis of its ordinary establishment. In consequence of representations made by the American government to this effect, new instructions to our cruisers were issued, January 8, 1794, apparently designed to exempt American ships trading between their own country and the colonies of France. The directions were "to bring in all vessels laden with goods the produce of the French West India Islands, and coming directly from any port of the said islands to any port in Europe."

In consequence of this relaxation of the general principle in favour of American vessels, a similar liberty of resorting to the colonial market for the supply of their

own consumption was conceded to the neutral states of *Europe*. To this effect, a third set of public instructions issued, January 25th, 1798, which, after reciting as the special cause of further alteration, "the present state of the commerce of this country, as well as that of neutral countries," direct cruisers "to bring in all vessels coming with cargoes the produce of any island or settlement of France, Spain, or Holland, and coming directly from any port of the said islands or settlements to any port of Europe not being a port of this kingdom, nor a port of the country to which such ships, being neutral ships, belonged."

Neutral vessels were, by this relaxation, allowed to carry on a *direct* commerce between the colony of the enemy and their own country: a concession rendered more reasonable by the events of the war, which, by annihilating the trade of France, Spain, and Holland, had entirely deprived the States of Europe of the opportunity of supplying themselves with the articles of colonial produce in those markets. 4 C. Rob. App. A. p. 2.

Various decisions which are mentioned in the principal case of *The Whilhelmina, Otto* (*ante*, p. 721), determined the illegality of the voyages of neutrals from the colonies of the enemy to neutral ports in Europe, not being the ports of the proprietors of the ship or cargo, nor a port of the United Kingdom. But under the relaxation last mentioned, a direct trade by a neutral between his own

country and a hostile colony was held good. Thus in the principal case of *The Immanuel, Eysenberg*, goods shipped at Hamburg with an ultimate destination to a French colony were restored, although they had been entered at and exported from Bordeaux, the learned judge who decided that case considering that those goods were entitled to be considered as coming from Hamburg, the original place of their shipment, and former decisions having fully established that a direct commerce from a neutral country to a French settlement was open. *Ante*, p. 707. See also *The Conferenzrath, Baur*, 6 C. Rob. 362; *The Rosalie and Betty*, 2 C. Rob. 343.

Where a belligerent country authorizes its own subjects to carry on a direct trade between the mother-country of the enemy and his colonies, it would have, it seems, the effect of authorizing neutrals by implication to carry on a similar trade. Where, however, a belligerent power merely authorizes its subjects to carry on a trade between their own country and a colony of the enemy, that, as laid down in the principal case of *The Immanuel*, could authorize no more than a trading between the neutral country itself and that country. See *ante*, p. 706.

So general was the system of monopoly which European countries maintained as to their colonial trade in the West Indies, that it was ordinarily presumed to be exclusively confined to the subjects of the parent state, unless the con-

trary were shown. 4 C. Rob. 341. The presumption, however, was not considered to be so strong as to settlements in the East, so that the Court of Admiralty would require evidence from the captors to show on what principle foreigners were permitted to trade with them, *Ib.*; and on failure of proof to show an exclusion of foreign nations from such trade restitution has been decreed. *Patapsco, Hall*, 1 Acton, 270.

In the principal case of *The Immanuel, Eysenberg*, the cargo only was held to be confiscable, and the same view was taken in other cases. See *The Minerva, Andaulle*, 3 C. Rob. 229; *The Anna Dorothea*, *ib.* 233, n. However in a subsequent case (*The Jonge Thomas*, Lords, 3 C. Rob. 233, n. Nov. 1801), where a ship was taken in a voyage from Amsterdam to Surinam, the Court of Appeal considered the illegality to attach as strongly on the ship as on the cargo, and pronounced the ship subject to condemnation, on the ground of the illegality of the trade between the mother-country and the colony of the enemy.

Although a neutral could not, according to the rule in question, export goods directly from the mother-country of the enemy to its colonies, he might first import such goods to his own country, so as to make them part of the national stock of his own country, and then export them to the enemy's colonies. *The Immanuel, ante*, p. 711. And in like manner the commodities of the colony

might, in this circuitous mode, legally find their way to the mother-country. *Ante*, p. 711. Questions, however, of some difficulty often arose, as to what amounted to a direct trade, or what amounted to an intermediate *bond fide* importation to a neutral country.

The Courts have not, however, laid down any rule, or attempted to define what shall be deemed universally the test of a *bond fide* importation (5 C. Rob. 399); and it is clear that the mere proof of landing and payment of duties in a neutral port, before proceeding to the enemy's port, although it may be important as evidence, is not necessarily conclusive as to such *bona fides*; indeed, if from other evidence it appears that a vessel has touched at a particular port for the mere purpose of giving to the voyage the colour and appearance of having begun there, it is immaterial to inquire whether the payment of duties has been one of the means employed to disguise the true nature of the transaction. *The Mercury, Roberts*, 5 C. Rob. 400, cited.

The principles upon which the Court of Admiralty acts in determining these questions has been well stated by Sir *William Grant*, M.R., in the leading case of *The William, Trefry* (5 C. Rob. 385, Lords, March 11, 1806), where an elaborate examination of the decisions upon this subject are to be found. "Nobody," said the learned judge, "has ever supposed that a mere deviation from the straightest and shortest course in which the voyage

could be performed would change its denomination, and make it cease to be a direct one within the intendment of the instructions. Nothing can depend on the degree or the direction of the deviation—whether it be of more or fewer leagues, whether towards the coast of Africa or towards that of America. Neither will it be contended that the point from which the commencement of a voyage is to be reckoned changes as often as the ship stops in the course of it; nor will it the more change because a party may choose arbitrarily, by the ship's papers or otherwise, to give the name of a distinct voyage to each stage of a ship's progress. The act of shifting the cargo from the ship to the shore, and from the shore back again into the ship, does not necessarily amount to the termination of one voyage and the commencement of another. It may be wholly unconnected with any purpose of importation into the place where it is done. Supposing the landing to be merely for the purpose of airing or drying the goods, or of repairing the ship, would any man think of describing the voyage as beginning at the place where it happened to become necessary to go through such a process? Again, let it be supposed that the party has a motive for desiring to make the voyage appear to begin at some other place than that of the original lading, and that he therefore lands the cargo purely and solely for the purpose of enabling himself to affirm that it was at such other place that the

goods were taken on board, would this contrivance at all alter the truth of the fact? Would not the real voyage still be from the place of the original shipment, notwithstanding the attempt to give it the appearance of having begun from a different place? The truth may not always be discernible, but when it is discerned, it is according to the truth, and not according to the fiction, that we are to give to the transaction its character and denomination. If the voyage from the place of lading be not really ended, it matters not by what acts the party may have evinced his desire of making it appear to have been ended. That those acts have been attended with trouble and expense cannot alter their quality or their effect. The trouble and expense may weigh as circumstances of evidence, to show the purpose for which the acts were done; but if the evasive purpose be admitted or proved, we can never be bound to accept, as a substitute for the observance of the law, the means, however operose, which have been employed to cover a breach of it. Between the actual importation by which a voyage is really ended, and the colourable importation which is to give it the appearance of being ended, there must necessarily be a great resemblance. The acts to be done must be almost entirely the same; but there is this difference between them, the landing of the cargo, the entry at the Custom House, and the payment of such duties as the law of the place requires, *are*

necessary ingredients in a genuine importation; the true purpose of the owner cannot be effected without them. But in a fictitious importation they are *mere voluntary ceremonies*, which have no national connection whatever with the purpose of sending on the cargo to another market, and which therefore would never be resorted to by a person entertaining that purpose, except with a view of giving to the voyage which he has resolved to continue the appearance of being broken by an importation which he has resolved not really to make." See *The Polly, Lasky*, 2 C. Rob. 361; *The Mercury*, 4 C. Rob. App. A. p. 6, n.; *The Eagle, Weeks*, ib.; *The Maria, Jackson*, 5 C. Rob. 365.

The principles according to which neutrals are forbidden in time of war from carrying on the colonial trade of a belligerent, from which they are excluded in time of peace, are equally applicable to the coasting trade of a belligerent if, during time of peace, he retains a monopoly of it, and only throws it open to neutrals in time of war. "As to the coasting trade," asks Sir *William Scott*, in a well-known case, " (supposing it to be a trade not usually opened to foreign vessels,) can there be described a more effective accommodation that can be given to an enemy during a war than to undertake it for him during his own disability? Is it nothing that the commodities of an extensive empire are conveyed from the parts where they grow and are manufactured, to other

parts where they are wanted for use? It is said that this is not importing anything new into the country—and it certainly is not; but has it not all the effects of such an importation? Suppose that the French navy had a decided ascendant, and had cut off all British communication between the northern and southern parts of this island, and that neutrals interposed to bring the coals of the north for the supply of the manufactures and for the necessities of domestic life of this metropolis, is it possible to describe a more direct and a more effectual opposition to the success of French hostility, short of an actual military assistance in the war?" *The Emanuel*, Soderstrom, 1 C. Rob. 300.

In a note to the last edition of the late Mr. Wheaton's 'Elements of International Law,' it is stated that the rule of the war of 1756 has become obsolete; that "the free trade which England has proffered to the navigation of all the world, including a participation in her colonial and coasting trade on an equality with her own vessels, does not admit of rules which governed in a period of monopoly, and when any relaxation which a belligerent accorded to neutrals might be deemed not a permanent regulation of trade, but strictly a measure to evade those advantages which a superior military marine placed within the control of the enemy." Wheaton's *International Law*, p. 575, n.

Now, this assertion is not quite

accurate. It is true that, as England has thrown open her colonial and coasting trade to the world, no nation at war with England could have any pretence for capturing neutrals carrying on the colonial or coasting trade of England, because they would be only carrying on in time of war their *accustomed* trade in time of peace, which the rule of war of 1756 does not attempt to prevent their doing. In the case also of other nations, who, like England, have ceased to retain a monopoly of their colonial and coasting trade, and who in time of peace have thrown it open to foreign nations, neutrals carrying on such trade in time of war, (as in the case of neutrals carrying on a similar trade with regard to England,) will not come within the operation of the rule of the war of 1756.

In the case, however, of such nations as now or hereafter may retain the monopoly either of their colonial or coasting trade, and in time of peace exclude therefrom other nations, the rule of war of 1756 is still operative, and justly so, too. The enemy, it is clear, has no right to complain that property engaged in such trade should be liable to capture; nor yet can neutrals, for the reasons so ably given by Sir *William Scott*, in the principal case of *The Immanuel*, *Eysenberg*. Indeed, the retention of the rule in its strict integrity may have the good effect of inducing other nations to follow the example of England, and, laying aside the selfish spirit of mono-

poly, to adopt, not partially, but universally, the liberal and enlightened principles of free trade.

During the late war with Russia, (assuming that country to have had colonies to which it was applicable,) the rule of war of 1756 appears to have been superseded by the Order in Council of the 15th of April,

1854, by which it is declared that "the subjects or citizens of any neutral or friendly state shall and may, during the present hostilities with Russia, freely trade with all ports and places, wheresoever situate, which shall not be in a state of blockade."

THE JONGE MARGARETHA, KLAUSEN, MASTER.

February 5th, 1799.

[REPORTED 1 C. ROB. 189.]

CONTRABAND OF WAR.]—According to the modern established rule, articles of provisions are generally not contraband of war, but they may become so under circumstances arising out of the particular situation of the war or the condition of the parties engaged in it.

Provisions are less liable to be treated as contraband when they are of the growth of the country which exports them, and when they are not prepared for immediate use.

Where articles of provision are going to a commercial port the presumption is that they are going there for civil use; contra, if they are going to a port of naval military equipment, and especially if there be a hostile armament then preparing there.

Cheese sent by a Papenberg merchant-vessel, (Holland and France being then at war with England,) from Amsterdam to Brest, in which a considerable armament was being prepared, condemned.

This was the case of a Papenberg ship, taken on a voyage from Amsterdam to Brest, with a cargo of cheese, April, 1797.

For the captors, the *King's Advocate* contended that the ship and cargo, belonging to the same person, were clearly confiscable, as concerned in a contraband trade of provisions to a port of naval equipment, and relied on the case of *The Vriendschap, Jansen* (Adm. July 5, 1798), in which the ship carrying salted beef from a French port to Brest was condemned, although not belonging to the owner of the cargo.

For the claimant, *Arnold and Swabey*.—It is contended that this ship and cargo, being the property of the same person, are both confiscable as concerned in a contraband trade. But provisions are not generally deemed contraband. Grotius speaks of them

as articles *promiscui usus*, and specifies some circumstances under which they may become contraband ; but these circumstances are of a very particular nature, such as the relief of places in distress ; and the general character is left free from exception, unless under such particular situations and circumstances.

Under the French law, which is a law of great severity, they have never been considered as contraband ; nor under the law of England, except in conjunction with other particular facts. The case on which the captors rely was composed of such facts—the papers were false—the voyage was from one French port to another ; and the cargo consisted of articles in a more prepared state—of a quantity of salted beef. The cargo was besides never claimed, and the ship was considered in the adopted character of a French victualler and condemned as such. If the case is to be decided on precedents, the claimants are entitled to argue that no precedents in point have been cited against them ; but that there are, on the other side, a variety of old cases in which cheese has been restored as not contraband. In 1747, *The Endraught*, a Prussian ship from Amsterdam to Bordeaux ; 3rd of March, 1747, *The Juffrow Magdalena*, a Prussian ship from Amsterdam to Bordeaux. In this last case there were many articles given up as contraband, but beer and cheese were restored with this dictum, “ that they were articles of luxury, and not merely ship’s provisions.” In the present case the cheese is in no state different from what would be useful for consumption on land as well as at sea. There have been no instances in which this article has been condemned, either in the present or in the last war ; and therefore it is submitted these claimants are entitled to restitution.

COURT.—I have many cases in which cheese has been restored ; but are there any that apply to the circumstance of a destination to ports of naval equipment ? I shall defer this case that more precedents may be examined ; and in the meantime, I direct an inquiry to be made as to the particular nature and quality of these cheeses by some officer of the King’s stores.

On the 20th of March, the storekeeper’s certificate was produced, stating them “ to be such cheeses as are used in English ships’ stores, when foreign cheeses are served, and such as are used in French ships almost exclusively of others.”

JUDGMENT.

SIR W. SCOTT.—There is little reason to doubt the property in this case, and therefore passing over the observations which have been made on that part of the subject, I shall confine myself to the single question,—Is this a legal transaction in a neutral, being the transaction of a Papenberg ship carrying Dutch cheeses from Amsterdam to Brest or Morlaix (it is said), but certainly to Brest ; or, as it may be otherwise described, the transaction of a neutral carrying a cargo of provisions, *not the product and manufacture of his own country*, but of the enemy's ally in the war—of provisions which are a capital ship's store—and to the great port of naval equipment of the enemy ?

If I adverted to the state of Brest at this time, it might be no unfair addition to the terms of the description if I noticed what was notorious to all Europe at this time, that there was in that port a considerable French fleet in a state of preparation for sallying forth on a hostile expedition ; its motions at that time watched with great anxiety by a British fleet, which lay off the harbour for the purpose of defeating its designs. Is the carriage of such a supply to such a place and on such an occasion, a traffic so purely neutral as to subject the neutral trader to no inconvenience ?

If it could be laid down as a general position, in the manner in which it has been argued, that cheese being a provision, is universally contraband, the question would be readily answered ; but the Court lays down no such position.

The catalogue of contraband has varied very much, and sometimes in such a manner as to make it very difficult to assign the reason of the variations, owing to particular circumstances the history of which has not accompanied the history of the decisions. In 1673, when many unwarrantable rules were laid down by public authority respecting contraband, it was expressly asserted by Sir *R. Wiseman*, the then King's Advocate, upon a formal reference made to him, that by the practice of the English Admiralty, corn, wine, and oil were liable to be deemed contraband. "I do agree," says he (reprobating the regulations that had been published, and observing that rules are not to be so hardly laid down as to press upon neutrals), "that corn, wine, and oil will be deemed contraband."

These articles of provisions then were at that time confiscable, according to the judgment of a person of great knowledge and

experience in the practice of this Court. In much later times many other sorts of provisions have been condemned as contraband. In 1747, in *The Jonge Andreas*, butter, going to Rochelle, was condemned; how it happened that cheese at the same time was more favourably considered according to the case cited by Dr. *Swabey*, I don't exactly know; the distinction appears nice; in all probability the cheeses were not of the species which is intended for ships' use. Salted cod and salmon were condemned in *The Jonge Frederick*, going to Rochelle in the same year. In 1748, in *The Joannes*, rice and salted herrings were condemned as contraband. These instances show that articles of human food have been so considered, at least where it was probable that they were intended for naval or military use.

I am aware of the favourable positions laid down upon this matter by Wolfius and Vattel and other writers of the continent, although Vattel¹ expressly admits that provisions may, under circumstances, be treated as contraband. And I take the modern established rule to be this, that generally they are not contraband, but may become so under circumstances arising out of the particular situation of the war or the condition of the parties engaged in it. The Court must therefore look to the circumstances under which this supply was sent.

Among the circumstances which tend to preserve provisions from being liable to be treated as contraband, one is, that they are of the growth of the country which exports them. In the present case they are the product of another country, and that a hostile country; and the claimant has not only gone out of his way for the supply of the enemy, but he has assisted the enemy's ally in the war by taking off his surplus commodities.

Another circumstance to which some indulgence by the practice of nations is shown, is when the articles are in their native and unmanufactured state. Thus, iron is treated with indulgence, though anchors and other instruments fabricated out of it are directly contraband. Hemp is more favourably considered than cordage; and wheat is not considered as so noxious a commodity as any of the final preparations of it for human use. In the pre-

¹ "Les choses qui sont d'un usage particulier pour la guerre, et dont on empêche le transport chez l'ennemi, s'appellent marchandises de contrabande. Telles sont les armes, les munitions de guerre, les bois, et

tout ce qui sert à construction et à l'armement des vaisseaux de guerre, les chevaux, et les vivres mêmes en certaines occasions, où l'on espère de réduire l'ennemi par la faim."—Vattel, book iii. ch. 7, sect. 112.

sent case the article falls under this unfavourable consideration, being a manufacture prepared for immediate use.

But the most important distinction is whether the articles were intended for the ordinary use of life, or even for mercantile ships' use; or whether they were going with a highly probable destination to military use? Of the matter of fact on which the distinction is to be applied, the nature and quality of the port to which the articles were going, is not an irrational test; if the port is a general commercial port, it shall be understood that the articles were going for civil use, although occasionally a frigate or other ships of war may be constructed in that port. *Contrà*, if the great predominant character of a port be that of a port of naval military equipment, it shall be intended that the articles were going for military use, although merchant ships resort to the same place, and although it is possible that the articles might have been applied to civil consumption; for it being impossible to ascertain the final use of an article *incipitis usus*, it is not an injurious rule which deduces both ways the final use from the immediate destination; and the presumption of a hostile use, founded on its destination to a military port, is very much inflamed if at the time when the articles were going a considerable armament was notoriously preparing to which a supply of those articles would be eminently useful.

In the case of *The Endraught*, cited for the claimant, the destination was to Bordeaux; and though smaller vessels of war may be occasionally built and fitted out there, it is by no means a port of naval military equipment in its principal occupation¹ in the same manner as Brest is universally known to be.

The Court, however, was unwilling in the present case to conclude the claimant on the mere point of destination, it being alleged that the cheeses were not fit for naval use, but were merely luxuries for the use of domestic tables. It therefore permitted both parties to exhibit affidavits as to their nature and quality. The claimant has exhibited none; but here are authentic certificates from persons of integrity and knowledge, that they are exactly such cheeses as are used in British ships, when foreign cheeses are used at all; and that they are exclusively used in French ships of war.

¹ Agreeably to this distinction, Dutch cheeses going from Amsterdam to Bordeaux, on account of a merchant of Al-

tona, were restored on further proof. *The Welvaart, Kwest*, Aug. 27, 1799.

Attending to all these circumstances I think myself warranted to pronounce these cheeses to be contraband, and condemn them as such. As however the party has acted without dissimulation in the case, and may have been misled by an inattention to circumstances to which in strictness he ought to have adverted, as well as by something like an irregular indulgence on which he has relied, I shall content myself with pronouncing the cargo to be contraband, without enforcing the usual penalty of the confiscation of the ship belonging to the same proprietor.

One of the most important exceptions to the rule allowing neutrals to carry on commercial intercourse with the belligerents on both sides, is that which forbids them to supply any of them with what is called contraband of war: under which term are comprehended all such articles as may serve a belligerent in the direct prosecution of his hostile purposes.

Neutrals cannot complain of this being any improper interference with their rights, because it would be a clear deviation from neutrality on the part of a neutral state to supply one belligerent with those articles which would enable him either to resist or attack the other, and such conduct therefore is not permissible to the individuals of such neutral state. If it were, neutrals, although not parties to the war, would have it in their power, by favouring one of the belligerents, very materially to influence its issue, and injure his opponent—in some cases even more effectually than by a hostile alliance.

As is laid down in the principal case, the catalogue of contraband

has varied very much, and sometimes in such a manner as to make it very difficult to assign the reason of the variations, owing to the particular circumstances, the history of which has not accompanied the history of the decisions. *Ante*, p. 734.

Possibly a good reason for each article in the list of contraband at different periods might be given, if we could get at the history of the circumstances under which each was either added to or eliminated from it. For nothing can be clearer than that the supply of certain articles at some particular period or under particular circumstances to a belligerent might be most noxious to his enemy; while at another time and under different circumstances, the supply so far as the war was concerned could have not the slightest influence upon its result. "Of this," says a learned author, "a good illustration is given by Mr. Ward (*Essay on Contraband*, p. 248) in the case of *hides*, which are in themselves an innocent article of traffic, but in such a conjuncture as where floating-

batteries designed for an attack on Gibraltar were being constructed at Algeziras, and hides were used as a chief article in the fitting out of that armament, we should be justified in stopping, if not in confiscating, hides carried to that port of equipment." Manning's Law of Nations, p. 282.

Without endeavouring to enumerate what articles either are or are not to be deemed contraband under treaties existing between various nations (as to which, see Manning on the Law of Nations, p. 284 *et seq.*), an attempt will be made briefly to show what articles are generally, under the law of nations existing independently of express convention, deemed contraband of war.

In the first place, all warlike instruments or materials by their own nature fit to be used in war are deemed contraband. See Wheaton, International Law, p. 586, 6th ed.

There are however many things *incipitis usus* which are equally useful for civil as well as military or naval purposes, and, as is laid down in the principal case with regard to provisions, the question whether articles *incipitis usus* are contraband or not will often turn upon their port of destination, whether it be a mercantile port or a port of military or naval equipment. In case of the former being the port of destination the articles may not be deemed contraband, whereas if the latter were the port of destination they could clearly be deemed such.

With regard to naval stores and

materials for building ships, in determining whether they are contraband or not, much depends upon whether they are the produce of the country importing them or whether they are the produce of another country. Thus pitch and tar are universally contraband, unless protected by treaty, or unless it is shown that they are the produce of the country from which they are exported, in which latter case they are considered, as we shall hereafter see, subject to pre-emption only. *The Twee Juffrouwen*, 4 C. Rob. 242; see also *The Sarah Christina*, 1 C. Rob. 241; *The Jonge Tobias*, ib. 329; *The Richmond*, 5 C. Rob. 325; and see *The Neutralitet*, 3 C. Rob. 295.

Rosin and tallow, if bound to an enemy's port of military or naval equipment, will be considered as contraband, but not if it be going to a mercantile port (*Nostra Signora de Begona*, 5 C. Rob. 97); and tallow has been held not contraband going to a mercantile port, although it was also a port of naval equipment. *The Neptuneus*, 3 C. Rob. 108. Sailcloth is contraband, although it be taken on a destination to ports of mere mercantile equipment. *Id.*

As coal is now so much used on board steamships of war, it would seem to follow upon principle that coals taken in their destination to an enemy's port of naval equipment would be considered as contraband of war.

Hemp, not the produce of the importing country, unless it be unfit for naval purposes (*The Guts*

Gesellschaft Michael, 4 C. Rob. 94; *The Jonge Hermanus*, ib. 95, n.), will be treated as contraband. *The Evert*, 4 C. Rob. 354; *The Apollo*, ib. 158.

A cargo of ship-timber going to an enemy's port of naval equipment will come under the description of the character of contraband (per Sir *Wm. Scott*, in *The Endraught*, 1 C. Rob. 25; *The Twende Brodre*, 4 C. Rob. 33); and masts, it seems, will be considered so, whether bound to a mercantile port only or to a port of naval military equipment (*The Charlotte*, 5 C. Rob. 314; *The Staaet Embden*, 1 C. Rob. 29); and a ship constructed so as to be convertible into a privateer will be contraband (*The Richmond*, 5 C. Rob. 325; *The Brutus*, ib. Append. 1); but where ships of ambiguous character, but previously employed in trade, were captured on their way to an enemy's colony in order to be sold there, they were restored. *The Fanny*, 5 C. Rob. App. 1, cited; *The Raven*, ib. 2, cited.

Moreover, as is laid down in the principal case, though iron in its unmanufactured state is treated with indulgence, anchors and other instruments fabricated out of it are directly contraband. *Ante*, p. 735.

The modern established rule with regard to provisions is, as laid down in the principal case, that generally they are not contraband, but may become so under circumstances arising out of the particular situation of the war, or the conditions of the parties engaged in it. Thus it has been frequently held, as in

the principal case, that cheese fit for naval use and going to a port of naval equipment is contraband. *Zelden Rust*, 6 C. Rob. 93; *The Frau Margaretha*, 6 C. Rob. 92. So ship-biscuits (*The Ranger*, 6 C. Rob. 125) and wines (*The Edward*, 4 C. Rob. 68) going to a naval port of the enemy have been held to be contraband. Cheeses however not fit for naval use, but merely luxuries for the use of domestic tables, as was admitted in the principal case by Sir *Wm. Scott*, would not be contraband, though going to a port of naval equipment (*ante*, p. 736); moreover such cheeses as were deemed contraband in the principal case, on account of their destination, would not be so if their port of destination is not a port of naval military equipment, although smaller vessels of war may be occasionally built and fitted out there. *The Erndraught*, cited *ante*, p. 733, 736; and see *The Frau Margaretha*, 6 C. Rob. 92; *The Welvaart*, *ante*, p. 736, n.

As a general rule articles of contraband must be taken *in delicto*, in the actual prosecution of the voyage to an enemy's port, and from the moment of quitting a port for a hostile destination the offence is complete (*The Imina*, 3 C. Rob. 168), and the result is the same although the voyage be taken from one port of the enemy to another (*The Edward*, 4 C. Rob. 68, 70); and a person will not be permitted to carry articles of a contraband nature to a hostile port under an intention of selling other innocent

commodities only, and of proceeding with the contraband articles to a port of ulterior destination. *The Trende Sostre*, 6 C. Rob. 390, 392, n.

Goods going to a neutral port cannot come under the description of contraband, *all* goods going there being equally lawful (*The Imina*, 3 C. Rob. 167); and goods will not be held contraband, even though their destination be a hostile port, if they were innocently shipped on board a vessel which sailed in *bond fide* ignorance of the war. *Jurgan v. Logan*, 1 Stair's Decisions, 477.

Under the present law of nations the proceeds of contraband cannot be taken on the return voyage, as it is said that the offence is deposited with the cargo (*The Frederick Molke*, *post*, p. 750), nor nor can the rest of the cargo, if innocent, be seized after the contraband part of the cargo has been disposed of. For as Sir *William Scott* has observed, "it would be an extension of the rule of infection not justified by any former application of it to say, that after the contraband was actually withdrawn, a mortal taint stuck to the goods with which it had once travelled, and rendered them liable to confiscation even after the contraband itself was out of reach." *The Immanuel, Eysenberg*, 2 C. Rob. 196, *ante*, p. 707.

Although a ship on her return is not liable to confiscation for having carried a cargo of contraband, yet it would be a little too much to say that all impression is done away; because if it appears that the owner had such

a cargo under a certificate obtained on a false oath that there was no contraband on board, it could not but affect his credit at the least, and induce the Court to look very scrupulously to all the actions and representations of such a person. *The Margaretha, Magdalena*, 2 C. Rob. 140; per Sir *William Scott*.

It has moreover been held that the carrying of contraband to a settlement of the enemy with false papers would affect even the return voyage. *The Charlotte*, 6 C. Rob. 386 n.; *Rosalie and Betty*, *ib.*; *Margaret*, 1 Acton, 333, 335; *Santissima Coração de Maria*, 2 Acton, 91; and see *The Nancy Knudsen*, 3 C. Rob. 122, where Sir *William Scott* considered the proceeds of contraband taken under false papers from Europe to a settlement of the enemy in the East Indies as liable to confiscation. "It is said," he observed, "that this is a past transaction and that in cases of contraband, the returned voyage has not usually been deemed connected with the outward. In European voyages of no great extent, where the master goes out on one adventure, and receives at his delivering ports new instructions and further orders in consequence of advice obtained of the state of the markets and other contingent circumstances, that rule has prevailed; but I do not think that in distant voyages to the East Indies, conducted in the manner this has been, the same rule is fit to be applied. In such a transaction, the different parts

are not to be considered as two voyages but as one entire transaction, formed upon one original plan, conducted by the same persons and under one set of instructions, *ab ovo usque ad mala*. The whole of it is termed by the parties themselves in these very papers, *the expedition* in which the returns are essentially connected with the outward cargo, and all considered as composing one adventure. Shall I then, viewing the matter in this light, separate for the benefit of such parties as these that which they have joined together? Shall I say, that this returned cargo is so unconnected with the original shipment from Europe as to receive no taint of discredit from the manner in which the parties have conducted themselves in the whole of the outward voyage? Till I am better instructed, I shall hold that parties setting out on such an expedition with ill faith, and pursuing that measure of ill faith up to its consummation in the delivery of the outward cargo, are implicated in the consequences of such a conduct throughout the whole sequel of that transaction. I shall therefore reject the claim as to the cargo, on the ground that these parties have, by their original *mala fides*, forfeited their fair pretensions to be admitted to any further proof."

Formerly, by the law of nations, the carrying of contraband articles in all cases involved a forfeiture of the ship, but in later times this practice has been relaxed (*The Jonge Tobias*, 1 C. Rob. 380), for where the owners of the ship and contra-

band cargo are different persons, the ship is allowed to go free, but subject to the forfeiture of freight and to expenses on the part of the neutral owner (*Ib.*; *The Mercurius*, 1 C. Rob. 288; *The Ringende, Jacob*, 1 C. Rob. 89, 90), though freight and expenses have been allowed where the contraband articles were but in a small quantity amongst a variety of other articles. *The Neptunus*, 3 C. Rob. 108.

The ground upon which such relaxation was introduced seems to have been that noxious or doubtful articles might have been taken on board without the personal knowledge of the owner (3 C. Rob. 297), but a neutral master will not be allowed to aver ignorance of the contents of his cargo. *The Oster, Risoer*, 4 C. Rob. 199.

Sir *William Scott*, although he decided many cases according to the new practice, considered that the ancient practice was perfectly defensible on every principle of justice. Inasmuch as "if the supplying the enemy with articles of contraband is a noxious act with respect to the owner of the cargo, the vehicle which is instrumental in effecting that illegal purpose cannot be innocent." 3 C. Rob. 295. The relaxations however do not apply to cases attended with aggravating circumstances, as where the vessel is taken on her way to a hostile port with a false destination, as that will subject both ship and cargo to condemnation. *The Franklin*, 3 C. Rob. 217; *The Edward*, 4 C. Rob. 68; *The Ranger*, 6 C. Rob. 125; *The Eliza*, cited 1 C. Rob. 91.

So likewise where the owner of the ship knowingly carries contraband in violation of a treaty, the ship will be liable to confiscation. *The Neutralitet*, 8 C. Rob. 295.

As a general rule, however all the other property of the owner of the contraband captured at the same time, whether it be cargo (*The Staat Embden*, *Jacobs*, 1 C. Rob. 26), or the ship (*The Neptuneus*, *Backman*, 6 C. Rob. 409), or a share in it (*Jonge Tobias*, *Hilken*, 1 C. Rob. 329), will be equally liable to confiscation as being involved in the same unlawful transaction; à fortiori if the vessel be taken with a false destination. *The Floreat Commecium*, *Radecker*, 3 C. Rob. 178.

Innocent parts of the same cargo, to escape from the contagion of contraband, must be the property of a different owner. *The Staat Embden*, *Jacobs*, 1 C. Rob. 301.

A clause in a treaty "that free ships make free goods," will not extend to any illegal trade as contraband (*The Asia*, cited in the Index to 6 C. Rob. p. 4), neither will permission to trade with the enemy "in innocent articles" extend to a mixed *assorted cargo*, consisting of articles partly innocent and partly noxious. *The Eleanora Whilelmina*, 6 C. Rob. 331.

The right of pre-emption by a belligerent has been before alluded to. It is confined to a certain class of articles which it would act to the disadvantage of a belligerent to allow their transport to the enemy, but which a mitigation of the former law does not now permit us to confiscate as contraband.

The right of pre-emption is generally applied to cases where the articles seized are *incipitis usus*, and are the products of the country exporting them. Thus, for instance, where pitch and tar (*The Twee Juffrowen*, *Etjes*, 4 C. Rob. 242, 243; *The Resolution*, ib. 166, n.), or hemp (*The Apollo*, *Bottcher*, 4 C. Rob. 158; *The Evert*, *Everts*, ib. 354), timber (*The Juffrow Wobetha*, 4 C. Rob. 163, cited) or provisions (*The Haabet*, 2 C. Rob. 182), are the produce of the country from which they are exported or the property of a merchant of the exporting country, they will be liable to pre-emption only, and not to confiscation, which would be their fate had they been the products of another country.

The practice which has substituted pre-emption for confiscation has been introduced because it has been deemed a harsh exercise of a belligerent right to prohibit the carriage of articles, which in the case of some countries constitute a considerable part of their native produce and ordinary commerce. "No unfair compromise," says Sir *William Scott*, "as it should seem, between the belligerents' rights, founded on the necessity of self-defence, and the claims of the neutral to export his native commodities though immediately subservient to the purposes of hostility." 1 C. Rob. 237.

It is incumbent, however, upon the claimants to show that they come within the relaxation in favour of nations exporting their own produce. *The Evert*, *Everts*,

4 C. Rob. 354; *The Twee Juffrowen, Etjes*, ib. 242.

In certain instances where the articles seized constitute the great staple commodity of the exporting country, as in the case of pitch and tar exported from Sweden, the presumption might be allowed in favour of the claimant without absolute proof. Per Sir *Wm. Scott*, 4 C. Rob. 243.

To entitle a party to the benefit of the rule of pre-emption, a perfect *bona fides* on his part is required. Thus, in *The Sarah Christina*, 1 C. Rob. 237, a Swedish vessel laden with tar, pitch, iron hoops and bars, was taken on her voyage to a French port under a colourable destination to a neutral port, Sir *Wm. Scott* condemned the cargo, withholding the allowance of freight and expenses to the ship. "It is asked," he observed, "why should a real destination to French ports be concealed if the neutral has a right to carry them avowedly? Clearly to give the French market a greater security. If pitch and tar are going avowedly to the enemy, they may be brought in for pre-emption; but if papers holding out a neutral destination are put on board, this right is eluded, and the enemy is commodiously and securely provided with the instruments of war. The cruiser can only examine to satisfy himself of the fact of the destination; but he cannot detain without a responsibility in damages. The false representation therefore is not useless for purposes of mischief; it is the passport and con-

voy for noxious articles to the ports of the enemy." See also *The Edward, Bartlett*, 4 C. Rob. 68.

With regard to the price to be paid for articles detained under the right of pre-emption, Sir *Wm. Scott* has made the following important observation:—"It is no certain rule that in all cases where a cargo is taken *jure belli* but for the mere purpose of pre-emption, that it is to receive a price calculated exactly in the same manner and amounting precisely to the same value as it would have done if it had arrived at its port of destination in the ordinary course of trade. The right of taking possession of cargoes of this description—*commeatus*, or *provisions* going to the enemy's ports—is no peculiar claim of this country, it belongs generally to belligerent nations; the ancient practice of Europe, or at least of several maritime states of Europe, was to confiscate them entirely; a century has not elapsed since this claim has been asserted by some of them. A more mitigated practice has prevailed in later times of holding such cargoes subject only to a right of pre-emption, that is, to a right of purchase upon a reasonable compensation to the individual whose property is thus diverted. I have never understood that on the side of the belligerent this claim goes beyond the case of cargoes avowedly bound to the enemy's ports, or suspected on just grounds to have a concealed destination of that kind; or that on the side of the neutral the same

exact compensation is to be expected which he might have demanded from the enemy in his own port; the enemy may be distressed by famine and may be driven by his necessities to pay a famine price for the commodity if it gets there; it does not follow that acting upon my rights of war in intercepting such supplies, I am under the obligation of paying that price of distress. It is a mitigated exercise of war on which my purchase is made, and no rule has established that such a purchase shall be regulated exactly upon the same terms of profit which would have followed the adventure if no such exercise of war had intervened; it is a reasonable indemnification and a fair profit on the commodity that is due, reference being had to the original price actually paid by the exporter and the expenses which he has incurred. As to what is to be deemed a reasonable indemnification and profit, I hope and trust that this country will never be found backward in giving a liberal interpretation to these terms; but certainly the capturing nation does not always take these cargoes on the same terms on which an enemy would be content to purchase them; much less are cases of this kind to be considered as cases of costs and damages, in which all loss of possible profit is to be laid upon unjust captors; for these are not unjust captures, but authorized exercises of the rights of war." *The Haabet*, 2 C. Rob. 181.

The transport of naval or mili-

tary forces of the enemy will lead to the condemnation of the ship and cargo as for a carriage of contraband of the most noxious character (*The Friendship*, 6 C. Rob. 420), nor is the number of such persons conveyed very material, for, as observed by Sir *Wm. Scott*, "number alone is an insignificant circumstance in the consideration on which the principle of law on this subject is built; since fewer persons of high quality and character may be of more importance than a much greater number of persons of lower condition. To send out one veteran general to take the command of forces might be a much more noxious act than the conveyance of a whole regiment. The consequences of such assistance are greater; and therefore it is what the belligerent has a stronger right to prevent and punish." *The Orozembo*, 6 C. Rob. 430, 434.

Upon the same principle, the offence of fraudulently carrying despatches in the service of the enemy will subject to confiscation the neutral vessel in which they are carried. "The carrying of two or three cargoes of military stores," says Sir *W. Scott*, "is necessarily an assistance of a limited nature; but in the transmission of despatches may be conveyed the entire plan of a campaign, that may defeat all the plans of the other belligerent in that quarter of the world. It is true, as it is said, that one ball might take off a Charles XII., and might produce the most disastrous effects in a

campaign; but that is a consequence so remote and accidental, that in the contemplation of human events it is a sort of evanescent quantity of which no account is taken; and the practice has been, accordingly, that it is in considerable quantities only that the offence of contraband is contemplated. The case of despatches is very different: it is impossible to limit a letter to so small a size as not to be capable of producing the most important consequences. It is a service therefore which, in whatever degree it exists, can only be considered in one character—as an act of the most hostile nature. The offence of fraudulently carrying despatches in the service of the enemy being, then, greater than that of carrying contraband under any circumstances, it becomes absolutely necessary, as well as just, to resort to some other penalty than that inflicted in cases of contraband. The confiscation of the noxious article, which constitutes the penalty in contraband where the vessel and cargo do not belong to the same person, would be ridiculous when applied to *despatches*. There would be no freight dependent on their transportation, and therefore this penalty could not, in the nature of things, be applied. The vehicle in which they are carried must therefore be confiscated.” *The Atalanta*, 6 C. Rob. 440, 455.

With regard to what will be considered despatches, Sir *William Scott* has laid it down “that they are all official communications of

official persons on the public affairs of the government. The comparative importance of the particular papers is immaterial, since the Court will not construct a scale of relative importance, which, in fact, it has not the means of doing with any degree of accuracy or satisfaction to itself: it is sufficient that they relate to the public business of the enemy, be it great or small. It is the right of the belligerent to intercept and cut off *all* communication between the enemy and his settlements, and, to the utmost of his power, to harass and disturb this connection, which it is one of the declared objects of the ambition of the enemy to preserve. It is not to be said, therefore, that this or that letter is of small moment: the true criterion will be, is it on the public business of the state, and passing between public persons in the public service? That is the question. If individuals take papers coming from official persons and addressed to persons in authority, and they turn out to be mere private letters, as may sometimes happen in the various relations of life, it will be well for them, and they will have the benefit of so fortunate an event. But if the papers so taken relate to public concerns, be they great or small, civil or military, the Court will not split hairs, and consider their relative importance. For on what grounds can it proceed to make such estimate with any accuracy? What appears small in words, or what may perhaps be artfully disguised, may relate to objects of

infinite importance, known only to the enemy, and of which the Court has no means of judging. The Court, therefore, will not take upon itself the burthen of forming such a scale, but will look only to the fact, whether the case falls within the general description or not." *The Caroline*, 6 C. Rob. 465; and see *The Susan*, ib. 461, n.

Where the papers are committed to the charge of a neutral by a person not invested with a public character, they will not be considered as despatches. See *The Rapid*, Edw. 228; *The Caroline*, 6 C. Rob. 469.

A neutral may carry despatches from an ambassador of the enemy resident in the neutral country to the ambassador's own government. "These," says Sir *William Scott*, "are despatches from persons who are, in a peculiar manner, the favourite object of the protection of the law of nations, residing in the neutral country for the purpose of preserving the relations of amity between that state and their own government. On this ground, a very material distinction arises with respect to the right of furnishing the conveyance. . . . The neutral country has a right to preserve its relations with the enemy, and you are not at liberty to conclude that any communication between them can partake, in any degree, of the nature of hostility against you. . . . The limits assigned to the operations of war against ambassadors by writers on public law are, that the belligerent may exercise his right of war against them,

wherever the character of hostility exists: he may stop the ambassador of his enemy on his passage, but when he has arrived in the neutral country and taken on himself the functions of his office and has been admitted in his representative character, he becomes a sort of *middle-man*, entitled to peculiar privileges, as set apart for the preservation of the relations of amity and peace, in maintaining which all nations are in some degree interested. If it be argued that he retains his national character unmixed, and that even his residence is considered as a residence in his own country, it is answered that this is a fiction of law, invented for his further protection only; and as such a fiction, it is not to be extended beyond the reasoning on which it depends. It was intended as a privilege, and cannot be urged to his disadvantage. Could it be said that he would, on that principle, be subject to any of the rights of war in the neutral territory? Certainly not: he is there for the purpose of carrying on the relations of peace and amity, for the interests of his own country primarily, but at the same time for the furtherance and protection of the interest which the neutral country also has in the continuance of those relations. It is to be considered also, with regard to this question, what may be due to the convenience of the neutral state; for its interest may require that the intercourse of correspondence with the enemy's country should not be altogether

interdicted. It might be thought to amount almost to a declaration that an ambassador from the enemy shall not reside in the neutral state, if he is declared to be debarred from the only means of communicating with his own. For to what useful purpose can he reside there, without the opportunity of such a communication? It is too much to say that all the business of the two states shall be transacted by the minister of the neutral state resident in the enemy's country. The practice of nations has allowed to neutral states the privilege of receiving ministers from the belligerent powers, and of an immediate negotiation with them." Per Sir *W. Scott* in *The Caroline*, 6 C. Rob. 461.

Upon the same principle, despatches may be conveyed on board a neutral vessel going from a hostile port to a consul of the enemy resident in a neutral country. *The Madison*, Edw. 224.

But if papers are really of a hostile or illegal nature, they will derive no protection by their being conveyed under the sanction of a neutral ambassador resident in the enemy's country. For the Court of Admiralty has held, in cases of convoy, that even the interposition of the sovereign of a neutral state will not take off the criminality of an illegal act (see *The Maria*, ante, p. 643); still less can an ambassador, acting only under a delegated authority from his sovereign, be permitted to assume a privilege so injurious to a belligerent whose rights it is his duty to respect. *The Madison*, Edw. 226.

There is nothing criminal in carrying despatches of a purely commercial character (*The Hope*, 6 C. Rob. 456, cited), nor in carrying despatches to a port of destination which ceased to be a colony of the enemy before the vessel reaches it (*The Trends Sostre*, 6 C. Rob. 457, cited), nor where the despatches have been put on board in fraud of the master, notwithstanding he has done all he could to prevent their being received. *The Lisette*, 6 C. Rob. 457, cited.

Where, however, a neutral master, from want of proper caution, suffers despatches to be conveyed on board his vessel, the plea of ignorance will not avail him. *The Rapid*, Edw. 228.

We have before seen that the fraudulent carrying of the enemy's despatches by a neutral involves a forfeiture of the ship. The same penalty will also be extended to the cargo when it is the property of the same owners (*The Atalanta*, 6 C. Rob. 440; and see *The Constantia*, ib. 461, n.), except where the master does not appear to be agent for the cargo (*The Hope*, 6 C. Rob. 463, n.); but the master's private adventure would in such a case be confiscated. *The Susan*, 6 C. Rob. 461, n.

Although the carrying of despatches may not be fraudulent, the ship and cargo will only be restored on payment of the captor's expenses, for a private merchant is under no obligation to be the carrier of the enemy's despatches to his own government. And one inconvenience to which he may be held fairly subject, is that of having

his vessel brought in for examination, and of the necessary detention and expense. He gives the captors an undeniable right to intercept and examine the nature and contents of the papers which he is carrying; for they *may* be papers of an injurious tendency, although not such, in any *à priori* presumption, as to subject the party who carries them to the penalty of confiscation, and by giving the captors the right of that inquiry, he must submit to all the inconveniences that may attend it. *The Caroline*, 6 C. Rob.

461, 469; *The Madison*, Edw. 226; *The Rapid*, ib. 231.

It may be here mentioned, that by a declaration made by the Queen on the 15th of April, 1854, although her Majesty, during the late Russian war, waived the right of seizing enemy's property laden on board a neutral ship, it was declared to be "impossible for her Majesty to forego the exercise of her right of seizing articles of contraband of war, and of preventing neutrals from bearing the enemy's despatches."

THE FREDERICK MOLKE, BOYSEN, MASTER.

December 10th, 1798.

[REPORTED 1 C. ROB. 85.]

BLOCKADE.]—*A vessel coming out of a blockaded port with a cargo is primâ facie liable to seizure. If the cargo was taken on board after the commencement of the blockade, ship and cargo will be liable to condemnation.*

This was the case of a Danish vessel taken coming out of Havre, on the 18th of August, 1798, and bound on a voyage from Havre to the coast of Africa, with a miscellaneous cargo.

JUDGMENT.

SIR W. SCOTT.—In this case a claim has been given for the ship and cargo, as the property of the same person, a Danish merchant of Christiania.

Several questions have been raised respecting the property,—the previous conduct of the vessel,—the legality of this sort of trade, and the actual violation of a blockade. I shall first consider the last question, because if that is determined against the claimant, it will render a discussion of all other points unnecessary.

First, then as to the blockade, these facts appear in the depositions of the master: "That on his former voyage he cleared out from Lisbon to Copenhagen, but was really destined to Havre, if he could escape English cruisers; that he was warned by an English frigate, 'The Diamond,' off Havre, not to go into Havre, as there were two or three ships that would stop him; but that he slipped in at night and delivered his cargo." It is therefore sufficiently proved that there were ships on that station to prevent ingress, and that the master knowingly evaded the blockade; for that a legal blockade did exist, results necessarily from these facts, as nothing further

is necessary to constitute blockade, than that there should be a force stationed to prevent communication, and a due notice or prohibition given to the party.¹

But it is still further material that this blockade certainly continued till the ship came out again. It is notorious indeed that Havre was blockaded for some time; and although the blockade varied occasionally, it still continued; for it is not an accidental absence of the blockading force, nor the circumstance of being blown off by wind (if the suspension, and the reason of the suspension are known), that will be sufficient in law to remove a blockade.

It is said, this was a new transaction, and that we have no right to look back to the delinquency of the former voyage; and a reference is made on this point to the law of contraband, where the penalty does not attach on the returned voyage: but is there that analogy between the two cases which should make the law of one necessarily, or in reason applicable to the other also? I cannot think there is such an affinity between them; there is this essential difference, that in contraband the offence is deposited with the cargo; whilst in such a case as this, it is continued and renewed in the subsequent conduct of the ship.

For what is the object of blockade? Not merely to prevent an importation of supplies; but to prevent export as well as import; and to cut off all communication of commerce with the blockaded place. I must therefore consider the act of egress¹ to be as culpable as the act of ingress, and the vessel on her return still liable to seizure and confiscation.

There may indeed be cases of innocent egress, where vessels have gone in before the blockade; and under such circumstances it could not be maintained, that they might not be at liberty to retire. But even then a question might arise, if it were attempted to carry out a cargo; for that would, as I have before stated, contravene one of the chief purposes of blockade.

A ship then, in all cases, coming out of a blockaded port, is in the first instance liable to seizure; and to obtain release, the claim-

¹ It has since appeared, that the blockade of Havre was notified to foreign ministers on the 23rd of February, 1798.

² Such is also the law and the practice of Holland. Bynkershoek, commenting on the orders of the States-General, June 26, 1630, says:—"Scilicet commercii intercludendi ergo ordines generales portus

Flandriae navibus bellicis obseuerant, adeoque omnes quorumcunque naves eo destinatas, indique exeuntes publicabant; quemadmodum ex ratione, et gentium usu, urbibus obseesis nihil quicquam licet advehere, vel ex his evehere." Bynk. 2 Q. P. book i. c. 4.

ant will be required to give a very satisfactory proof of the innocence of his intention. In the present case, the ingress was criminal and the egress was criminal; and I am decidedly of opinion, that both ship and cargo, being the property of the same person, are subject to confiscation.—Condemned.

THE BETSEY, MURPHY, MASTER.¹

December 18th, 1798.

[REPORTED 1 C. ROB. 93.]

BLOCKADE.]—*A declaration of blockade by a commander without an actual investment will not constitute blockade. In a case of neutral property captured by the English and recaptured by the French, compensation was sued from the original British captors, but refused, on the ground of a bonæ fidei possession; irregularities, to bind a former captor being a bonæ fidei possessor, must be such as produce irreparable loss, or justly prevent restitution from the recaptors.*

This was a case of a ship and cargo taken by the English at the capture of Guadaloupe, April the 13th, 1774, and retaken, together with that island, by the French in June following. The ship was claimed for Mr. Patterson, of Baltimore; and the cargo, as American property. The captors, being served with a monition to proceed to adjudication, appeared under protest; and the cause now came on upon the question, whether the claimants were entitled to demand of the first British captors restitution in value for the property which had then passed from them to the French recaptors? The first seizure was defended on a suggestion that *The Betsey* had broken the blockade at Guadaloupe.

JUDGMENT.

SIR W. SCOTT.—This is a case which it will be proper to consider under two heads. I shall first dispose of the question of blockade; and then proceed to inquire on whom the loss of the

¹ Affirmed on Appeal, June 2, 1799.

recapture by the French ought to fall under all the circumstances of the case.

On the question of blockade three things must be proved:—1st, the existence of an actual blockade; 2ndly, the knowledge of the party; and 3rdly, some act of violation, either by going in or by coming out with a cargo laden after the commencement of blockade. The time of shipment would on this last point be very material, for although it might be hard to refuse a neutral liberty to retire with a cargo already laden, and by that act already become neutral property, yet after the commencement of a blockade a neutral cannot, I conceive, be allowed to interpose in any way to assist the exportation of the property of the enemy. After the commencement of the blockade a neutral is no longer at liberty to make any purchase in that port.

It is necessary, however, that the evidence of a blockade should be clear and decisive; but in this case there is only an affidavit of one of the captors, and the account which is there given is, "that on the arrival of the British forces in the West Indies a proclamation issued, inviting the inhabitants of Martinique, St. Lucie, and Guadaloupe to put themselves under the protection of the English; that on a refusal, hostile operations were commenced against them all." But it cannot be meant that they began immediately against all at once; for it is notorious that they were directed against them separately and in succession. It is further stated, "that in January, 1794 (but without any more precise date), Guadaloupe was summoned, and was then put into a state of complete investment and blockade."

The word "complete" is a word of great energy; and we might expect from it to find that a number of vessels were stationed round the entrance of the port to cut off all communication; but from the protest I perceive that the captors entertained but a very loose notion of the true nature of a blockade; for it is there stated, "that on the 1st of January, after a general proclamation to the French islands, they were put into a state of complete blockade." It is a term, therefore, which was applied to all those islands at the same time under the first proclamation.

The Lords of Appeal have determined that such a proclamation was not in itself sufficient to constitute a legal blockade. It is clear, indeed, that it could not in reason be sufficient to produce the effect which the captors erroneously ascribe to it; but from the misapplication of these phrases in one instance I learn that we

must not give too much weight to the use of them on this occasion, and from the generality of these expressions I think we must infer that there was not that actual blockade which the law is now distinctly understood to require.

But it is attempted to raise other inferences on this point, from the manner in which the master speaks of the difficulty and danger of entering, and from the declaration of the municipality of Guadalupe, which states "the island to have been in a state of siege." It is evident that the American master speaks only of the difficulty of avoiding the English cruisers generally in those seas; and as to the other phrase, it is a term of the new jargon of France which is sometimes applied to domestic disturbances; and certainly is not so intelligible as to justify me in concluding that the island was in that state of investment from a foreign enemy which we require to constitute a blockade. I cannot, therefore, lay it down that a blockade did exist till the operations of the forces were actually directed against Guadalupe in April.

It would be necessary for me, however, to go much further, and to say that I am satisfied also that the parties had knowledge of it; but this is expressly denied by the master. He went in without obstruction. Mr. Incledon's statement of his belief of the notoriety of the blockade is not such evidence as will alone be sufficient to convince me of it. With respect to the shipment of the cargo, it does not appear exactly under what circumstances or what time it was taken in. I shall therefore dismiss this part of the case.

The case being on the first point pronounced a case of restitution, a second point arises out of the recapture of the property by the French; and the question is, whether the original captors are exonerated by their responsibility to the American claimants? It is to be observed that at the time of the recapture America was a neutral country and in amity with France. I premise this fact as an important circumstance in one part of the case; but the principal points for our consideration are, whether the possession of the original captors was, in its commencement, a legal *bonæ fidei* possession? and 2ndly, whether such a possession, being just in its commencement, became afterwards by any subsequent conduct of the captors tortious and illegal? for on both these points the law is clear, "that a *bonæ fidei* possessor is not responsible for casualties," "but that he may by subsequent misconduct forfeit the protection of his fair title and render himself liable to be considered

as a trespasser from the beginning." This is the law, not of this Court only, but of all Courts, and one of the first principles of universal jurisprudence.

The cases in which it has been particularly applied in this Court have been cited in the arguments; and I will briefly advert to the circumstances of them, as they will afford much light to direct us in the present case. *The Nicolas and Jan* was one of several Dutch ships taken at St. Eustatius and sent home under convoy to England for adjudication. In the mouth of the channel they were retaken by the French fleet; there was much neutral property on board sufficiently documented; and in that case a demand was made on behalf of a merchant of Hamburg for restitution in value from the original captor. It was argued, I remember, that the captors had wilfully exposed the property to danger by bringing it home, whilst they might have resorted to the Admiralty Courts in the West Indies; and therefore, that the claimants were entitled to demand indemnification from them; but on this point the Court was of opinion that under the dubious circumstances in which those cases were involved, and under the great pressure of important concerns in which the commanders were engaged, they had not exceeded the discretion which is necessarily entrusted to them by the nature of their command.

It was urged also against the claimants in that case, that since the property had been retaken by their allies, they had a right to demand restitution in specie from them; and on these grounds our courts rejected their claims.

In *The Hendrick and Jacob* also (Lords, July 21, 1790), the case turned upon similar considerations of the nature of the possession. It was a case of a Hamburgese ship, taken erroneously as Dutch, and retaken by a French privateer. In going into Nantes the vessel foundered and was lost. On demand for restitution against the original British captor, the Lords of Appeal decided, that as it was a seizure made on unjustifiable grounds, the owners were entitled to restitution from some quarter; that as the French recaptor had a justifiable possession under prize taken from his enemy, he was not responsible for the accident that had befallen the property in his hands; that if the property had been saved, indeed, the claimant must have looked for redress to the justice of his ally, the French; but since that claim was absolutely extinguished by the loss of the goods, the proprietor was entitled to his indemnification from the original captor. Under a view of these precedents, we

must inquire first into the nature of the original seizure in the present case; whether it was so wrongful as to bring the seizer all the consequences of that strict responsibility which attaches to a tortious and unjustifiable possession.

It has been rather insinuated than affirmed openly in argument, that there was anything wrong or unjustifiable in the first capture; but it is said the great injustice arises from the detention, and from that irregularity of conduct in the captors which has put it out of the power of the claimants to support their claim and obtain restitution from the French.

In respect to the first seizure, although it is admitted now that there was not a blockade, yet it must be allowed also on the other side, that the island of Guadaloupe was at that time in a situation extremely ambiguous and critical. It could be no secret in America that the British forces were advancing against this island; and that the planters would be eager to avail themselves of the interference of neutral persons to screen and carry off their property. Under such a posture of affairs, therefore, ships found in the harbours of Guadaloupe must have fallen under very strong suspicions, and have become justly liable to very close examination. The suspicion besides would be still further aggravated, if it appeared, as in this case it did appear, that those for whom the ships were claimed, kept agents stationed on the island; and might therefore be supposed to be connected in character and interest with the commerce of the place. It is true, indeed, the Lords of Appeal have since pronounced the island to have been not under blockade; but it was a decision that depended upon a greater nicety of legal discrimination than could be required from military persons, engaged in the command of an arduous enterprise.

The same considerations which justify the seizure, apply also to the second charge of detention in this case; for under these suspicions and these doubts, it was not a slight examination of formal papers that could be deemed sufficient. The captors were entitled to reserve the property so taken for legal adjudication; and as they could not erect a jurisdiction on the spot, so neither were they at leisure then to send the cases to distant courts. The first capture was made April 13; the recapture took place so early as the 2nd of June following; there was an interval but of six weeks. The French were, as the subsequent event proves, in great force in those parts; the commanders had much to occupy their attention; the number of vessels taken under these circumstances was very con-

siderable; and therefore it is not to be mentioned as an injurious or unnecessary delay, that in six weeks so employed, no means were found to bring the ships to adjudication.

But it is said, the irregular proceedings of the captors have rendered them liable to the strictest responsibility. Now on this point I must distinctly lay it down, that the irregularities, to produce this effect, must have been such as would justly prevent restitution by the French. If such a case could be supported, I will admit there might then be just grounds for resorting to the British captor for indemnification; but till this is proved, the responsibility which lies on recaptors to restore the property of allies and neutrals, will be held by these Courts to exonerate the original captors.

What then has been the nature of these irregularities? It is said that the masters and proprietors were sent away from their ships; and therefore that there was no one to apply for restitution at the time of recapture. But what was there to prevent them from making these applications afterwards? Are the French more than the English courts exempted from making subsequent restitution? They hold, indeed, that possession of twenty-four hours will convert the property of prize; but this is not applicable to a neutral vessel. So strongly did the maritime jurisprudence of ancient France consider neutral property to be in a state of absolute inviolability, that no salvage was allowed on retaking neutral vessels, on the supposition that no service had been rendered to them. Such was the language of their law, and therefore no bar to restitution can have arisen from the impossibility of making immediate application.

It is said further, that the papers were all thrown confusedly together; by which it was put out of the power of the claimants to produce that proof and those documents which the courts of France require.

I know it was a maxim of the French law, and a maxim not deficient in justice, that if in time of war a ship is found sailing about the world without any credentials of character, she is liable to confiscation; but if a just reason could be given for this defect, if accident or force could be shown to have stripped her of these documents, can it be conceived that the general rule would be applied to such a case? Unless the courts of France have renounced every principle of justice, such a consequence could not have ensued from the want of documents in these cases; and therefore it is not in reason to be presumed. Supposing these irregularities to have existed, and in the censurable degree which this argument imputes

to them, they have not in any manner taken off the obligation which the French lie under to restore this property; I must determine that they would not, under any proceedings of justice, have prevented restitution from the French.

On no other ground can the proprietors be entitled to claim it from the British. If the neutral has sustained any injury, it proceeds not from the British, but from the French; and there is no reason that British captors should pay for French injustice. I must pronounce the protest to be well founded, and the captors to be discharged from any further proceedings.

Lawrence said there was a quantity of silver on board which had not been retaken.

King's Advocate.—After what has fallen from the Court, I cannot object to the restitution of the specie.

June 22, 1799. This cause was reheard before the Lords of Appeal. The sentence of the Court below was affirmed.

Nothing is better established, as an exception to the general freedom of the trading operations of neutrals in time of war than this, that it is unlawful for a neutral to trade with a port or place besieged or blockaded by one of the belligerent powers, whatever that trade may be, and although the articles furnished thereby may not come within the meaning of the term contraband. The reason is this, that it is the duty of a neutral to preserve a strict impartiality in his dealings with the belligerents, whereas by furnishing supplies to one during a blockade, he would be favouring such one at the expense of the other, by perhaps supplying the very articles which enabled the blockaded place to prolong its

resistance, or even to compel the besieging party to raise the blockade.

Of course neither the subjects nor the allies of the country establishing a blockade would be permitted to violate it, for such conduct, in addition to the other objections which would apply to it in common with a similar attempt on the part of neutrals, would amount to such dealing or intercourse with the enemy as we have before seen (see note to *The Hoop*, ante, p. 688) will not, without proper license, be allowed. See *Baltazzi v. Ryder*, 12 Moo. P. C. C. 187.

A declaration of blockade is a high act of sovereign authority, and cannot in general be either imposed or extended by a commander without special authority.

The Henrick and Maria, 1 C. Rob. 148; and see 6 C. Rob. 365.

Where, however, a commander goes out to a distant station, he may reasonably be supposed to carry with him such a portion of sovereign authority delegated to him, as may be necessary to provide for the exigences of the service in which he is employed. On stations in Europe, where government is almost at hand to superintend and direct the course of operations, under which it may be expedient that particular hostilities should be carried on, it may be different; but in distant parts of the world it cannot be disputed, that a commander must be held to carry with him sufficient authority to act, as well against the commerce of the enemy as against the enemy himself, for the more immediate purpose of reduction. *The Rolla*, 6 C. Rob. 364, 366.

There is no doubt that any portion of the enemy's coast may be blockaded, provided an adequate force be applied for that purpose. The first Napoleon, it is true, in his celebrated Berlin Decree, dated the 21st of November, 1806, questioned this right, and complained that England "extended the right of blockade to unfortified cities and ports, to harbours and the mouths of rivers," while, as he alleged, "this right, according to reason and the usage of civilized nations, is only applicable to fortified places." But, as observed by a learned author, "this limitation of those who

ventured to call themselves the assertors of the law of nations, namely, confining the right of blockade to fortified places, and leaving harbours exempt from such restraint, was entirely new and unheard of, and in opposition to the clear principle of blockade." *Manning's Law of Nations*, p. 337.

Another objection taken in the Berlin Decree to the conduct of England was, that she "declared blockaded, places before which she had not a single ship of war, although a place cannot be deemed blockaded, unless it be so invested that there is an evident danger in entering: and that she declared blockaded places which her whole forces united would be unable to blockade—whole coasts, and all an empire." And by the Milan Decree, dated 17th of December, 1807, Napoleon declared the British Islands and her colonies in a state of blockade.

A blockade of such a character, which has been well termed "a paper blockade," is, no doubt, contrary to the law of nations, for, as we shall hereafter see, a blockade, in order to be effectual, must be actual, and supported by an adequate force; but the system of blockade complained of by the Berlin Decree, was adopted by England as a mode of retaliation for the unwarrantable proceedings of the first Napoleon, when he commenced those operations which afterwards ripened into what was termed "the continental system," by which he endeavoured to ex-

clude all nations, even neutrals, from all commerce with England.— France, in effect, declared that the subjects of other states should have no access to England; England on that account, declared that the subjects of other states should have no access to France. “So far,” says Sir *William Scott*, in remarking on this state of affairs, “this retaliatory blockade (if blockade it is to be called) is co-extensive with the principle: neutrals are prohibited to trade with France, because they are prohibited by France from trading with England. England acquires the right, which it would not otherwise possess, to prohibit that intercourse, by virtue of the act of France.” *The Fox*, Edw. 321.

The conduct of England, therefore, in declaring blockades, unsupported by a sufficient force, was adopted in order to meet an exceptional case, and could not therefore be approved of under other circumstances, or be referred to, on ordinary occasions, as a precedent to guide belligerents in future wars. For a brief and admirable sketch of “The Continental System,” see Manning’s ‘*Law of Nations*,’ 330–349. *The Arthur*, 1 Dods. 423, 425; *The Fox*, Edw. 311, 321; *The Snipe*, ib. 381.

In the principal case of *The Betsey*, it is laid down by Sir *William Scott*, that to constitute a violation of blockade “three things must be proved:—1st, the existence of an actual blockade; 2ndly, the knowledge of the party supposed to have offended; and 3rdly,

some act of violation, either by going in or by coming out with a cargo laden after the commencement of blockade.”

1st. There must be an existence of an actual blockade. In order to constitute an actual blockade, the law requires that there should be an adequate force present to prevent all communication with the blockaded ports. “The usual and regular mode of enforcing blockades,” says Sir *William Scott*, “is by stationing a number of ships, and forming, as it were, an arch of circumvallation round the mouth of the prohibited port. Then if the arch fails in any one part, the blockade fails altogether.” 1 Dods. 425.

Another definition of what amounts to a lawful blockade, and which is generally considered to be correct, is that taken from the Convention of 1801 between Great Britain and Russia, which declares, “That in order to determine what characterizes a blockaded port, that denomination is given only where there is, by the disposition of the power which attacks it with ships stationary or sufficiently near, an evident danger in entering.” See 3 Art. s. 4.

Where there is a merely maritime blockade of a place, it will not be violated by any communication by means of inland navigation, to which the blockade is not applied. Thus, in *The Stert*, 4 C. Rob. 65, it was held that the blockade of Amsterdam was not violated by shipments to Embden by inland navigation, with an ulte-

rior destination to London. "The Court," said Sir *Wm. Scott*, "cannot take upon itself to say, that a legal blockade exists where no actual blockade can be applied. In the very notion of a complete blockade it is included, that the besieging force can apply its power to every point of the blockaded state. If it cannot, it is no blockade of that quarter where its power cannot be brought to bear; and where such a partial blockade is undertaken, it must be presumed that this is no more than what was foreseen by the blockading state, which nevertheless thought proper to impose it to the extent to which it was practicable."

The blockade will not be suspended although the blockading force is by accident, as by the winds, kept at a distance. In *The Columbia*, 1 C. Rob. 154, Sir *W. Scott* says, "The blockade was to be considered as legally existing, although the winds did occasionally blow off the blockading squadron. It was an accidental change which must take place in every blockade, but the blockade is not therefore suspended. The contrary is laid down in all the books of authority; and the law considers an attempt to take advantage of such an accidental removal as an attempt to break the blockade, and as a mere fraud." But it may be inferred from what is laid down by Sir *William Scott*, in the principal case of *The Frederick Molke*, that a blockade might under such circumstances be considered as removed if the reason of the suspen-

sion of the blockade by the blockading force being blown off by the wind were unknown. *Ante*, p. 750.

The principle, however, that when a blockading squadron is driven off by adverse winds, neutrals are bound to presume it will return, and that there is no discontinuance of the blockade, cannot be extended to the case of a blockading squadron driven off by a superior force, as in that case there will be a total defeasance of the blockade and its operation. *The Hoffnung*, 6 C. Rob. 112, 117, 120; *The Triheten*, 6 C. Rob. 65.

A blockade has been well characterized as a universal exclusion of all vessels not privileged by law. If, therefore, some vessels are permitted to pass, others will have a right to infer that the blockade is raised. *The Rolla*, 6 C. Rob. 372; *The Juffrouw Maria Schroeder*, 3 C. Rob. 147, 156; *The Vrouw Barbara*, ib. 158, n.; *The Christina Margaretha*, 6 C. Rob. 62.

A relaxation of blockade in favour of belligerents, to the exclusion of neutrals, is clearly illegal; nor, it seems, will a similar relaxation in favour of some neutrals make it legal. Thus, in *Northcote v. Douglas (The Franciska)*, 10 Moo. P. C. C. 37, on the 15th of April, 1854, the commander of the Baltic fleet blockaded *de facto*, amongst other places, the Gulf of Riga. The English Government on the same day issued an Order in Council giving permission, up to the 15th of May, for Russian vessels to discharge their cargoes from Russian ports in the Baltic

and White Seas to their port of destination, even though those ports were in a state of blockade. A similar permission was granted by the French Government, and the Russian Government, by a ukase, allowed the same indulgence to English and French ships. On the 14th of May, 1854, a neutral vessel, under Danish colours, sailed from Copenhagen for Riga, and was captured off Riga by an English ship of war on the 22nd of that month, for a breach of the blockade of that port. It was held by the Judicial Committee and Lords of the Privy Council, reversing the decision of Dr. *Lushington* (1 Spinks, 111), that, as the Order in Council must be taken to have extended to British and French ships, and as it relaxed the blockade in favour of the belligerents to the exclusion of neutrals, the blockade was illegal: restitution was therefore decreed, though without costs. "Lord *Stowell*," observed Lord *Kingsdown*, in delivering judgment, "when he defines a blockade, always speaks of it as the exclusion of the blockaded place from *all* commerce, whether by egress or ingress. In *The Frederick Molke* (1 C. Rob. 87) he says:—'What is the object of a blockade? Not merely to prevent an importation of supplies, but to prevent export as well as import, and to cut off *all* communication of commerce with the blockaded place.' In *The Betsey* (1 C. Rob. 93), 'After the commencement of a blockade a neutral cannot, I conceive, be allowed to interpose in

any way to assist the exportation of the property of the enemy.' In *The Vrouw Judith* (1 C. Rob. 151):—'A blockade is a sort of circumvallation round a place, by which all foreign connection and correspondence is, as far as human force can effect it, to be *entirely* cut off; and a neutral is no more at liberty to assist the traffic of exportation than of importation.' In *The Rolla* (6 C. Rob. 372):—'What is a blockade but a uniform exclusion of all vessels not privileged by law?' In *The Success*, (1 Dods. 134):—'The measure which has been resorted to being in the nature of a blockade, must operate to the entire exclusion of British as well as neutral ships; for it would be a gross violation of neutral rights to prohibit their trade, and to permit the subjects of this country to carry on an unrestricted commerce at the very same ports from which neutrals are excluded.'

"It is contended that the objection of a neutral to the validity of a blockade, on the ground of its relaxation by a belligerent in his own favour, is removed if a Court of Admiralty allows to the neutral the same indulgence which the belligerent has reserved to himself or granted to his enemy. But their Lordships have great difficulty in assenting to this proposition. In the first place, the particular relaxation which may be of the greatest value to the belligerents may be of little or no value to the neutral. . . . Again, it is not easy to answer the objections

which a neutral might make, that the condition of things which alone authorizes any interference with his commerce does not exist; namely, the necessity of interdicting *all* communication by way of commerce with the place in question; that a belligerent, if he inflicts upon neutrals the inconvenience of exclusion from commerce with such place, must submit to the same inconvenience himself, and that, if he is to be at liberty to select particular points in which it suits his purpose that the blockade should be violated with impunity, each neutral, in order to be placed on equal terms with the belligerent, should be at liberty to make such selection for himself. But the ambiguity in which all these questions are left by the Order in Council of the 15th of April; the doubt whether the liberty accorded to enemies' vessels extends to neutrals; and if so, whether such liberty is subject to the same restrictions, or to any other and what restrictions, affords, in the opinion of their Lordships, another strong argument against the legality of the blockade in this case." *The Steen Bille* (1 Spinks, 161); *The Union*, ib. 164; *The Jeanne Marie*, ib. 167; *The Norren*, ib. 171, belonged to the same class of cases as *The Franciska*, which was selected to try the question.

If a partial, modified blockade is to be enforced against neutrals, justice seems to require that the modifications intended to be introduced should be notified to neutral

states, and that they should be fully apprised what acts their subjects may or may not do. They cannot reasonably be exposed to the hardship of either abstaining from all commerce with a place in such a state of uncertain blockade, or of having their ships seized and sent to the country of the belligerent, in order to learn there, from the decision of its Court of Admiralty whether the conduct they have pursued is or is not protected by an equitable interpretation of an instrument in which they are not expressly included. Per Lord *Kingsdown* in *Northcote v. Douglas*, 10 Moo. P. C. C. 54.

An important distinction is observed with respect to the burthen of proof as to the existence of blockade in the case of a blockade by simple fact, and in the case of a blockade by a notification accompanied with the fact. "In the former case, when the fact ceases (otherwise than by accident or the shifting of the wind) there is immediately an end of the blockade; but where the fact is accompanied by a public notification from the government of a belligerent country to neutral governments, it seems that, *prima facie*, the blockade must be supposed to exist until it has been publicly repealed. It is the duty, undoubtedly, of a belligerent country which has made the notification of blockade, to notify in the same way, and immediately, the discontinuance of it: to suffer the fact to cease, and to apply the notification again, at a distant time, would be a fraud on neutral

nations, and a conduct which it is not to be supposed any country would pursue. It cannot indeed be said that a blockade of this sort might not in any possible case expire *de facto*; but such conduct is not hastily to be presumed against any nation; and, therefore, till such a case is clearly made out, it will be held that a blockade by notification is *prima facie* to be presumed to continue till the notification is revoked." *The Neptunus*, 1 C. Rob. 171.

2ndly. In order to constitute a violation of a blockade, not only must an actual blockade exist, but it is necessary that it should be brought to the knowledge of the party supposed to have offended. "It may be notified in a public and solemn manner by declaration to foreign governments; and this mode would always be most desirable, although it is sometimes omitted in practice." *The Vrouw Judith*, 1 C. Rob. 52.

"But it may commence also *de facto* by a blockading force giving notice on the spot to those who come from a distance, and who therefore may be ignorant of the fact. Vessels *going in* are, in that case, entitled to a notice before they can be justly liable to the consequences of breaking a blockade. But it is quite otherwise with vessels coming out of the port which is the object of blockade; there no notice is necessary after the blockade has existed *de facto* for any length of time: the continued fact is itself a sufficient notice. It is impossible for those

within to be ignorant of the forcible suspension of their commerce. The notoriety of the thing supersedes the necessity of particular notice to each ship." *Ib.*

"The effect of a notification to any foreign government would clearly be to include all the individuals of that nation; it would be the most nugatory thing in the world if individuals were allowed to plead their ignorance of it; it is the duty of foreign governments to communicate the information to their subjects, whose interests they are bound to protect. A neutral master can never be heard to aver against a notification of blockade that he is ignorant of it. If he is really ignorant of it, it may be a subject of representation to his own government, and may raise a claim of compensation from them, but it can be no plea in the court of a belligerent. In the case of a blockade *de facto* it may be otherwise." *The Neptunus*, 2 C. Rob. 111; *The Spes and Irene*, 5 C. Rob. 76.

It is the duty of a government, having received a public notification of a blockade, to communicate it to its subjects in foreign ports (*The Welvaart Van Pillaw*, 2 C. Rob. 130), but it will not be presumed that such communication has been made until after a reasonable time has elapsed. *The Calypso*, 2 C. Rob. 298; *The Neptunus*, 3 C. Rob. 175; *The Adelaide*, *ib.* 285; *The Jonge Petronella*, 2 C. Rob. 131.

Another distinction between a notified blockade and a blockade existing *de facto* only, is that in

the former the act of sailing to a blockaded place is sufficient to constitute the offence. It is to be presumed that the notification will be formally revoked, and that due notice will be given of it; till that is done the port is to be considered as closed up; and from the moment of quitting port to sail on such a destination the offence of violating the blockade is complete, and the property engaged in it subject to confiscation. It may be different in a blockade existing *de facto* only; there no presumption arises as to the continuance, and the ignorance of the party may be admitted as an excuse for sailing on a doubtful and provisional destination. *The Neptunus*, 2 C. Rob. 113.

The notice of a blockade must not be more extensive than the blockade itself. A belligerent cannot be allowed to proclaim that he has instituted a blockade of several ports of the enemy, when in truth he has only blockaded one; such a course would introduce all the evils of what is termed a paper blockade, and would be attended with the grossest injustice to the commerce of neutrals. Accordingly, a neutral is at liberty to disregard such a notice, and is not liable to the penalties attending a breach of blockade for afterwards attempting to enter the port which really is blockaded. *Northcote v. Douglas*, 10 Moo. P. C. C. 59. See also *The Henrick and Maria*, 1 C. Rob. 148. There an officer of the blockading squadron had informed a neutral that *all* the Dutch

ports were in a state of blockade, whereas the blockade was confined to Amsterdam; and Lord *Stowell*, in decreeing restitution, observed, "The notice is, I think, in point of authority illegal; at the time when it was given there was no blockade which extended to all Dutch ports. A declaration of blockade is a high act of sovereignty; and a commander of a king's ship is not to extend it. The notice is also, I think, as illegal in effect as in authority; it cannot be said that such a notice, though bad for other ports, is good for Amsterdam. It takes from the neutral all power of election as to what other port of Holland he should go when he found the port of his destination under blockade."

But a blockade will not be vitiated merely on account of the omission of one of the conditions under which vessels might be permitted to go out. *The Rolla*, 6 C. Rob. 370.

3rdly. In addition to the notice of blockade, there must be some act of violation either by going in, or by coming out with a cargo laden after the commencement of the blockade. The sailing of a vessel with an intention of evading a blockade by ingress, is a beginning to execute that intention, and is an overt act constituting the offence, and from that moment the blockade is fraudulently invaded. *The Columbia*, 1 C. Rob. 154-156; *The Tutela*, 6 C. Rob. 181. And after knowledge of an existing blockade a vessel must not go to the station

of the blockade under pretence of inquiry as to the blockade (*The Spes and Irene*, 5 C. Rob. 76; *The Posten*, 1 C. Rob. 335 n), or for a pilot. *The Arthur*, Edw. 206. And where a vessel is entering or approaching a blockaded port, it is no valid excuse on the part of the master to allege that he was bound by his charter-party to sail there (*The Tutela*, 6 C. Rob. 181), that he is merely sailing in ballast (*The Comet*, Edw. 32), that he is in want of a pilot to carry him to a lawful port (*The Elizabeth*, Edw. 198), or that he wishes to make inquiries. *The James Cook*, Edw. 263; *The Posten*, 1 C. Rob. 335, n.; *The Arthur*, Edw. 202.

Where a vessel is in an equivocal situation with reference to the place blockaded, the master is bound on the first notice to take himself out of it, and if he obstinately refuses and neglects to do so, such conduct will amount to breach of the blockade, and subject the vessel to condemnation. *The Apollo*, 5 C. Rob. 290. Indeed it may be laid down that neutral ships cannot innocently place themselves in a situation where they may with impunity break the blockade whenever they please. If the belligerent country has a right to impose a blockade, it must be justified in the necessary means of enforcing that right; and if a vessel could, under the pretence of going further, approach cypres close up to the blockaded port, so as to be enabled to slip in without obstruction, it would be impossible that any

blockade could be maintained. It would be no unfair rule of evidence to hold, as a presumption *de jure*, that she goes there with an intention of breaking the blockade; and if such an inference may possibly operate with severity in particular cases where the parties are innocent in their intentions, it is a severity necessarily connected with the rules of evidence and essential to the effectual exercise of this right of war. *The Neutralitet*, 6 C. Rob. 35. If a vessel be taken out of its course and in the neighbourhood of a blockaded port, it cannot be restored without further proof of destination, and if the claimant declines further proof the Court is bound to condemn the property. *The Chrysseys, Moraiti*, Spinks, 343.

The evidence of the place of capture must be taken from the depositions, log, and ship-papers, and as to the deduction to be drawn from the place of capture when once fixed by such evidence, except in a glaring case, the Court will never take upon itself to pronounce an opinion without the assistance of Trinity Masters. It is obvious that it could not safely do so, because so many nautical matters, such as courses, winds, and currents, must be taken into consideration, that none but persons of nautical science could safely draw any conclusion. Per *Lushington*, Dr., in *The Fortuna, Anderson*, Spinks, 309.

It has been held that ships sailing from America before the knowledge of a blockade had reached

America, were entitled to a notice even at the blockaded port; and that ships sailing afterwards might sail on a contingent destination even to that port, with the purpose of calling at some British port or at some neutral port for information; and that they should be allowed the benefit of such contingent destination, to be ascertained and rendered definite by the information which they should receive in Europe. But in no case has it been held that they might sail to the mouth of a blockaded port, to inquire whether a blockade of which they had received previous formal notice was still in existence or not. *The Spes and Irene*, 5 C. Rob. 81; *The Shepherdess*, ib. 262.

A blockade is just as much violated by a vessel passing outwards as inwards, and a neutral vessel cannot lawfully take from the place blockaded a cargo laden after the commencement of the blockade. "A blockade," says Sir *Wm. Scott*, "is a sort of circumvallation round a place by which all foreign connection and correspondence is, as far as human force can effect it, to be entirely cut off. It is intended to suspend the entire commerce of that place, and a neutral is no more at liberty to assist the traffic of exportation than of importation. The utmost that can be allowed to a neutral vessel is, that having already taken on board a cargo before the blockade begins, she may be at liberty to retire with it. But it must be considered as a rule, which this Court means to apply, that a neutral ship

departing can only take away a cargo *bond fide* purchased and delivered before the commencement of the blockade. If she afterwards takes on board a cargo, it is a fraudulent act and a violation of the blockade." *The Vrow Judith*, 1 C. Rob. 151; *The Neptunus*, 1 C. Rob. 170; *The Johanna Maria*, Spinks, 307; *Cremidi v. Powell*, 11 Moo. P. C. C. 116.

Thus, where a master voluntarily entered a blockaded port, and after having been compelled, as he alleged, to sell his cargo, he took on board another cargo, it was held that both the entry into the blockaded port and the sailing out with a fresh cargo were both violations of the blockade. *Byfield*, Edw. 188.

A vessel cannot after the commencement of the blockade be purchased from the enemy by a neutral in a blockaded port, as a traffic cannot be allowed in ships more than in goods, and consequently such transfer is illegal (*The Speculation*, Edw. 346), and it is immaterial out of what funds the purchase is effected. *The Vigilantia*, 6 C. Rob. 122.

Where a vessel, that was clearly the property of the enemy at the commencement of the war, is taken coming out of a blockaded port from which she could not sail if she had been transferred from the enemy during the existence of the blockade, satisfactory proof must be given of the transfer before the commencement of the blockade, or the ship will be condemned. *The Vigilantia*, 6 C. Rob. 122, 124.

But a transfer of a vessel from one neutral to another, as it is in no manner connected with the commerce of the blockaded port, is allowable, and such vessel may come out of a blockaded port. *The Potsdam*, 4 C. Rob. 89; *The Vigilantia*, 6 C. Rob. 124, 125.

Where a vessel has entered a blockaded port *before* the blockade, she is entitled to come out again with the cargo she took in or in ballast, or with a cargo taken on board before notice of the blockade. *The Juno*, 2 C. Rob. 119; *The Nossa Senhora*, 5 C. Rob. 52; *The Potsdam*, 4 C. Rob. 89; *Cremidi v. Powell*, 11 Moo. P. C. C. 116. The same rule which permits neutral merchants to withdraw their ships from a blockaded port, extends also, with equal justice, to merchandise sent in before the blockade, and withdrawn *bonâ fide* by the neutral proprietors. *The Juffrouw Maria Schroeder*, 4 C. Rob. 89 n.

Where, however, a ship comes out of a blockaded port in ballast, and is afterwards taken with a cargo on board, sent out of the same port in lighters under charter-party with the ship, the ship and cargo will be condemned. *The Charlotte Sophia*, 6 C. Rob. 204 n.; *The Maria*, 6 C. Rob. 201; *The Lisette*, 6 C. Rob. 304.

And as, *primâ facie*, every vessel whatsoever laden with a cargo, quitting a blockaded port, is liable to condemnation on that account, and must satisfactorily establish her exception to the general rule, the very fact of coming out of a

blockaded port is probable cause for detention, and the captors, although the ship and cargo be restored, run no risk of being condemned in costs and damages. *The Otto and Olaf*, Spinks, 257, 259.

Where a place has been declared to be blockaded for the purpose of preventing the importation of a particular article wanted by the enemy, it will not amount to a breach of blockade, if a vessel leaves the blockaded place exporting a cargo of that particular article, especially if its exportation be forbidden by the enemy. See *Cremidi v. Powell*, 11 Moo. P. C. C. 88, 115. There, in the summer of 1854, the Russian forces in the Turkish territories being straitened for provisions, the allied fleets desired to prevent the importation of provisions up the Danube, and with this view the two admirals in command of the English and French fleets issued a proclamation, dated the 2nd of June, 1854, in which they declared, to all whom it might concern, that they had established an effective blockade of the Danube, in order to stop all transport of provisions to the Russian armies; they declared that this blockade included all those mouths of the Danube which communicate with the Black Sea, and they apprised all vessels of every nation that they will not be able to enter the river until further orders. On the 26th of June, the Russians forbade all export of cereals after the 2nd of July. Any exportation of cereals, therefore, was in furtherance of

the objects of the allies, and to the prejudice of the Russians. It was held by the Judicial Committee and Lords of the Privy Council, that a neutral ship, even if she had notice of this blockade, was not liable to capture by the allies for *exporting* provisions, inasmuch as the whole object of the blockade was declared to be to prevent their *import*.

If a ship that has broken a blockade, is taken in any part of her voyage, she is taken *in delicto*, and subject to confiscation. See *The Welvaart, Van Pillaw*, 1 C. Rob. 128, where a Prussian ship having sailed with a cargo from Amsterdam, then blockaded, was taken in April, 1799, off Dungeness; Sir *W. Scott*, in his judgment condemning the vessel, said, "One circumstance on which exemption is prayed, is that the ship had escaped the interior circumvallation, if I may so call it; that she had advanced some way on her voyage, and therefore that she had in some degree made her escape from the penalties. I cannot accede to that argument; if the principle is sound, that a neutral vessel is not at liberty to come out of a blockaded port with a cargo, I know of no other natural termination of the offence but the end of that voyage. It would be ridiculous to say, if you can but get past the blockading force you are free; this would be a most absurd application of the principle. If that is sound, it must be carried to the extent that I have mentioned; for I see no other point at which it can be terminated." *The*

Juffrouw Maria Schroeder, 3 C. Rob. 153.

There is no analogy between the law of contraband, where, as we have seen, as a general rule the penalty does not attach on the returned voyage, for there is this essential difference, that in contraband the offence is deposited with the cargo, whilst by egress from a blockaded port the offence is continued and renewed in the subsequent conduct of the ship. For the object of blockade is, not merely to prevent an importation of supplies, but to prevent export as well as import, and to cut off all communication of commerce with the blockaded place. The act of egress therefore is as culpable as the act of ingress, and the vessel on her return is still liable to seizure and confiscation. *The Frederick Molke, Boysen, ante*, p. 750; *The Adelaide*, 2 C. Rob. 111 n.; *The General Hamilton*, 6 C. Rob. 61.

However, although the offence incurred by a breach of blockade generally remains during the voyage, it must be understood as subject to the condition, that the blockade itself continues. Thus in *The Lisette, Steg*, 6 C. Rob. 387, a vessel which had broken a blockade was captured during the voyage, but not till after the blockade had ceased: it was held by Sir *William Scott* that she ought to be restored. "When the blockade is raised," he observed, "a veil is thrown over everything that has been done, and the vessel is no longer taken *in delicto*. The

delictum may have been completed at one period, but it is by subsequent events entirely done away."

Where a neutral vessel has been permitted to leave a blockaded port upon permission under Orders in Council (see Order in Council of January, 1807), to go to a neutral port, if notwithstanding she goes to a hostile port, she will be liable to capture on her subsequent voyage after leaving such port. It is only by such means that such an order can be maintained, or such conduct repressed. For until the vessel actually enters into the interdicted port, nothing appears, whether she be *in delicto* or not. Cruisers see nothing; she goes in, and then the offence is consummated, and the intention is for the first time declared. It is not till the vessel comes out again that any opportunity is afforded of vindicating the law, and of enforcing the restriction of the order. It might be objected, that if the penalty was applied to the subsequent voyage, it might travel on with the vessel for ever. In principle, perhaps, it might not unjustly be pursued further than to the immediate voyage; but in practice it has not been carried further than to the voyage succeeding, which affords the first opportunity of enforcing the law. *The Christianberg*, *Vanderweyde*, 6 C. Rob. 376; *Rander's Bye*, *ib. n. p.* 382.

The question has arisen, how far the conduct of the ship taken in violation of blockade will affect the cargo. In the case of *The Mer-*

curius (1 C. Rob. 80), which came before Lord *Stowell* in 1798, a cargo had been put on board *The Mercurius* in America, at a time when it could not have been known in that country that the blockade of the Texel had been established. The master, after warning, attempted to enter the Texel, and the ship was condemned, because the owner was bound by the act of the master; but the cargo was restored, because, as Lord *Stowell* observes, the *shippers, at the time of shipment, could not have known of the blockade*; and the master, although he was the agent of the owner of the vessel, and could bind him by his contract or his misconduct, was not the agent of the owners of the cargo, unless expressly so constituted by them.

Where, however, at the time of the shipment the blockade either was or might have been known by the owners of the cargo, and they might therefore possibly be aware of an intention of violating the blockade, if the vessel be condemned for breach of blockade, they cannot save the vessel from condemnation by showing their innocence in the transaction, but will be considered as concluded by the illegal act of the master, although it was done without their privity, and even if it were done contrary to their wishes. See *Baltazzi v. Ryder*, 12 Moo. P. C. C. 168; there *The Panaghia Rhomba* took in a cargo of wheat at Galatz in the month of September, 1855 (during the Russian war), to be conveyed to the Piræus or Syra,

on the joint account of Signor Cuppa, an Ionian merchant resident at Constantinople, and of Messrs. Baltazzi, British merchants, resident in London. In the month of November following the vessel was captured by her Majesty's ship 'Dauntless,' for an attempt to violate the blockade of the port of Odessa, which had subsisted from the month of February, 1855, and was then continuing. It was held by the Judicial Committee and Lords of the Privy Council, affirming the decision of Dr. *Lushington* that it was not competent to the owners of the cargo to protect their property from condemnation by showing their innocence in the transaction, and that they were concluded by the illegal act of the master. "In the case of *The Mercurius* (1 C. Rob. 80)," said Lord *Kingsdown*, in delivering judgment for their Lordships, "Lord *Stowell* seems to have thought that the owners of cargo were not bound by the act of the master without their authority; and the judgment seems rather to warrant the marginal note which the very learned reporter has stated as the effect of it, namely, 'Violation of blockade by the master affects the ship, but not the cargo, unless the property of the same owner, or unless the owner is cognizant of the intended violation.' Now, in the present case, Dr. *Lushington* has stated his conviction that the owners of the cargo were innocent of all knowledge of the intended violation; and if, therefore, the law remained as it is to be collected from the

case of *The Mercurius*, their Lordships would have great difficulty in assenting to the decision now under review. But the subsequent cases appear to have carried the rule much further, and to have established that, when the blockade was known, or might have been known, to the owners of the cargo at the time when the shipment was made, and they might, therefore, by possibility be privy to an intention of violating the blockade, such privy shall be assumed as an irresistible inference of law, and it shall not be competent to them to rebut it by evidence; that in cases of blockade for the purpose of affecting the cargo with the rights of the belligerent, the master shall be treated as the agent for the cargo as well as for the ship. This is the result of the cases cited by Dr. *Lushington* in his judgment, and the additional authorities mentioned at the bar. In the case of *The Alexander* (4 C. Rob. 94), which occurred in 1801, Lord *Stowell* held that, in cases of breach of blockade, the Court must infer 'that a ship going in fraudulently is going in the service of the cargo, with the knowledge and by the direction of the owner.' In the case of *The Adonis* (5 C. Rob. 259), which occurred in 1804, he went a step further, and held not only that such inference must be made, but that (with the exception to which we have already referred) the owners could not be let in to prove a contrary intention. This case was affirmed upon appeal, and it possesses, therefore, all the au-

thority which the decisions of the tribunal of a single country can give in a law in which all civilized countries are concerned. The same doctrine is laid down by the same great judge in the case of *The Exchange* (1 Edwards' Rep. 42), in 1808, and in *The James Cook* (1 Edwards, 261), in 1810. We find, therefore, a series of authorities establishing a general rule, which, like all general rules, may in its application to particular cases be occasionally attended with hardship, but which nevertheless may be necessary to prevent fraud, and may, on the whole, promote the purposes of justice. It is a rule not applicable exclusively to neutrals, but applies with equal force to all persons attempting to violate a blockade, though they may be the subjects or the allies of the country which has established it. In the present case, indeed, Messrs. Baltazzi, the claimants, are British subjects. The propriety, or rather the necessity of these rules, is rested by Lord Stowell on the notoriety of the fact that, in almost all cases of breach of blockade, the attempt is made for the benefit and with the privity of the owners of the cargo; that if they were at liberty to allege their innocence of the act of the master, it would always be easy to manufacture evidence for the purpose, which the captors would have no means of disproving; and that, in order to make a blockade effectual, it is essential to hold the cargo responsible to the blockading power for the act

of the master, to whom the control over it has been entrusted, leaving the owners to seek their remedy against the master or the owners of the ship, if in reality the penalty was incurred without any privity on their part."

Although at the time of sailing the blockade be unknown to the owners, even when by treaty a previous warning of the blockade is necessary, if the master, consignees, and all persons entrusted with the management of the ship, are sufficiently informed of the blockade, the cargo will be condemned with the ship, for the owner having delegated general powers to others, upon their misusing their trust his remedy must be against them. *The Columbia, Weeks*, 1 C. Rob. 154. As owners however of cargo will not be strictly bound by the act of an enemy shipper acting as their agent, if the breach of blockade by egress be committed without their knowledge, although the ship and freight of their agent be forfeited, the cargo will be restored. *The Neptunus, Kuyp*, 3 C. Rob. 173; *The Adelaide, Box*, 3 ib. 281; *The Manchester, Reynolds*, 2 Acton, 60. This is just, for although, as a general rule, principals must be held bound by the acts of their agents, the Court of Admiralty is not disposed to carry the rule to the full extent to which it might properly be applied in ordinary transactions, and looks with indulgence towards those cases where neutrals, without any fault of their own, have had their property

placed in jeopardy by the breaking out of hostilities, and the acts of agents over whom they could not at the time exercise control, and who might have an interest in the very act which endangered the property of their principals (*The Jeanne Marie, Kolle*, Spinks, 167); a cargo however purchased by a supercargo sent by the owners for that purpose, will be condemned upon her egress from a blockaded port. *The Nornen, Dahl*, Spinks, 171.

Restitution with costs and damages will be made if it appears distinctly from the papers of a ship that she has committed no breach of blockade, and that her captors have seized her without any ostensible cause. Thus, in *The Ostsee, Voss*, Spinks, 174, a neutral was captured by one of her Majesty's ships of war, and sent in for adjudication as for breach of the blockade of Cronstadt. It turned out that Cronstadt was not blockaded at the time when the vessel entered that port, nor at the time when she took her cargo on board, nor at the time when she left Cronstadt, nor even at the time when she was captured, nor for more than three weeks afterwards; and no blockade of Cronstadt had been proclaimed, either by the British Government or by the admiral. It was held by the Court of Appeal, reversing the decision of Dr. *Lushington*, that the neutral was entitled to costs and damages as well as restitution. "The law which we are to lay down," said Lord *Kingsdown*, in

delivering the judgment of the Court, "cannot be confined to the British navy; the rule must be applied to captors of all nations. No country can be permitted to establish an exceptional rule in its own favour, or in favour of particular classes of its own subjects. On the law of nations, foreign decisions are entitled to the same weight as those of the country in which the tribunal sits. America has adopted almost all her principles of prize law from the decisions of English Courts; and, whatever may have been the case in former times, no authorities are now cited in English Courts, in cases to which they are applicable, with greater respect than those of the distinguished jurists of France and America. Whatever is held in England to justify or excuse an officer of the British navy, will be held by the tribunals of every country, both on this and the other side of the Atlantic, to justify or excuse the captors of their own nation.

"By the usage of all countries, captors have a great interest in increasing the number of prizes. The temptation to send in ships for adjudication is sufficiently strong. Is it too much to say that where no ground of suspicion can be shown, and all that the captor can allege is that he did wrong under a mistake, he should make good in temperate damages the injury which he has occasioned? Ought a captor to be permitted to say to the captured, 'True, nothing suspicious appeared

in your case at the time of seizure, but upon further inquiry something might have been discovered. I had a right to take my chance; you have nothing to complain of. I subjected you to no unnecessary inconvenience; go about your business, and be thankful for your escape? We cannot think that this would be deemed a satisfactory answer to a British neutral seized by a foreign belligerent." See also S. C. 9 Moo. P. C. C. 150, nom. *Schacht v. Otter*; see also, *The Fortuna, Anderson, Spinks*, 307; *The Elize, Spinks*, 88.

But where the ship by her suspicious conduct may give rise to an appearance of an intention to violate a blockade, simple restitution only will be made. *The Queen v. Hildebrandt*; *The Aline and Funny*, 10 Moo. P. C. C. 491.

As to the allowances to *bonâ fide* captors where a vessel has been sold under a decree afterwards reversed, and simple restitution decreed, see *The Franciska*; *The Union*, 10 Moo. P. C. C. 73.

Restitution with costs and damages may be decreed against the captor of a vessel for an alleged breach of blockade, where in consequence of his wrongful act the claimant has been deprived of an opportunity of affording the explanations which the rules of law were intended to secure him. See *Cremidi v. Powell*, 11 Moo. P. C. C. 88.

Exemptions from Forfeiture.—The question has been mooted but not decided, as to how far under a

treaty of "free ships, free goods," the privilege can be extended to the carrying of enemy's property out of a blockaded town. (*The Nossa Senhora*, 5 C. Rob. 52.) The better opinion would seem to be that, the privilege would not be held to apply to such a case.

An express license from the supreme power of the blockading country will be a sufficient protection to a vessel sailing to or from a blockaded port. *The Juno*, 2 C. Rob. 116; *The Hoffnung*, 2 C. Rob. 162, 163. It has however been laid down that "a license expressed in general terms, to authorize a ship to sail from *any* port with a cargo, will *not* authorize her to sail from a *blockaded* port with a cargo taken in there;—to exempt a blockaded port from the restrictions incident to a state of blockade, it must be specially designated with such an exemption in the license; otherwise a blockaded port shall be taken as an exception to the general description in the license." *Byfield, Forster*, Edw. 190.

As however the exclusion from all commerce with blockaded ports is a great inconvenience to neutrals, licenses to trade with them will be construed liberally. Thus where a neutral had a license to go to certain ports, but the license contained no provision as to bringing back any cargo, it was held by Sir *Wm. Scott*, whatever might be the legal effect of such a license, that the bringing away a cargo in the absence of any fraud, was a mere innocent misapprehension, which carried no con-

sequences of penalty after it. *The Juno*, 2 C. Rob. 116.

Where a vessel has a license to enter a blockaded port, liberty to come out again with a return cargo, in the absence of any provision upon the subject, will be considered as a benefit incidental to the license. *Ib.* 116, 118.

A belligerent, it seems, has no right to interrupt the communication between a neutral government and its representative in a blockaded port; at any rate, if the despatches are carried in a public manner, in vessels commissioned by the state for that purpose, and vested with the character of packets. It is doubtful whether a merchant-vessel would be protected by carrying papers of such a description, while engaged in a transaction otherwise illegal; that question however can only be raised by a claim given on the part of the government, and cannot be set up by the merchant-vessel as a ground for protection. *The Drummond*, *Langdon*, 1 Dods. 103, 104.

Although a vessel by sailing to a blockaded port after notification, renders herself liable to be captured on her voyage, as being taken *in delicto*, it has nevertheless been held that if she has been misinformed by a cruiser of the enemy that the port is not blockaded, she will be restored, although taken in attempting to enter the port. For although a fleet cannot give a person any authority to go into a blockaded port, still after such information he is not taken *in delicto*, and it would be too hard to press

the former offence against him; it would be to press a pretty strong principle rather too strongly. *The Neptunus*, *Hempel*, 2 C. Rob. 110, 115.

Permission however by a former captor of a vessel to proceed on her voyage under a mistake of law, will not justify a breach of blockade. *The Comet*, *Mix*, Edw. 32. Where there is a misinformation as to the fact of the blockade, it may have a different effect (see *The Neptunus*, *Hempel*, *ante*), but the neutral is bound to know the law, and cannot allege that he has been ill-instructed in that by a belligerent cruiser. If the cruiser had told the parties they might go on whilst they were conusant of the fact of the blockade, such misinformation upon a point of law would not protect the ship. *The Comet*, *Mix*, Edw. 34, per Sir *Wm. Scott*; and see *The Courier*, *Erick*, *ib.* 249.

A vessel will be restored if the breach of blockade has been occasioned by unavoidable necessity: as where a vessel has been compelled to put into the blockaded port by stress of weather. (*The Charlotta*, *Elliot*, Edw. 252; *The Fortuna*, *Rhode*, 5 C. Rob. 27); or from being in want of repairs, and for such purpose only (Edw. 252): it must however be proved that the breach of blockade was clearly an act of imperative and overruling necessity. *The Elizabeth*, *Nowell*, Edw. 198; *The Christiansberg*, *Vanderweyde*, 6 C. Rob. 376, 378; *Baltazzi v. Ryder*, 12 Moo. P. C. C. 168, 171, 172.

The want of provisions is an excuse which will not on light grounds be received ; because an excuse, to be admissible, must show an imperative and overruling compulsion to enter the particular port under blockade, which can scarcely be said in any instance of mere want of provisions. It may induce the master to seek a neighbouring port, but it can hardly ever force a person to resort exclusively to the blockaded port. *The Fortuna, Rhode*, 5 C. Rob. 27, per Sir *Wm. Scott* ; and see *The Hurtige Hane, Dahl*, 2 C. Rob. 124.

The immediate and pressing danger of seizure and confiscation by the country of the blockaded port, will, it seems, justify egress of a vessel. Thus in *The Drie Vrienden, Cassens*, 1 Dods. 269, it was held that a neutral ship coming out of a blockaded port, in consequence of a rumour that hostilities were likely to take place between the enemy and the country to which the vessel belonged, was not

liable to condemnation, though laden with a cargo, as the regulations of the enemy would not permit a departure in ballast ; but the cargo was condemned, though put on board against the will of the master.

The mere apprehension however of possible and remote danger, as for instance that of seizure by the enemy, will not justify a master in bringing a cargo out of a blockaded port ; for even if his apprehensions be well founded, that will not justify his violating the rights of another country. He must rely upon his neutrality, and look to his own government for protection. *The Wasser Hundt, Lorentzen*, 1 Dods. 270, n.

It is no excuse for egress from a blockaded port to say, that the cargo is to be brought to the blockading country ; the ship is no more at liberty to break the blockade for such a purpose than for any other. *The Byfield, Forster*, Edw. 189, per Sir *Wm. Scott*.

THE FORTUNA, TADSEN, MASTER.

June 24th, 1802.

[REPORTED 4 C. ROB. 278.]

CAPTURE OF ENEMY'S SHIP—CARGO BELONGING TO NEUTRAL RESTORED.]—*When an enemy's ship is taken having cargo belonging to a neutral on board, the ship will be condemned and the cargo restored, as being neutral property. If the captor takes the cargo to its original port of destination, he will be entitled to freight; secus, if he does not proceed there and perform the original voyage.*

This was a case on petition of the captors, praying to be allowed freight for a cargo which had been restored as neutral property. The demand for freight was founded on a suggestion, that *the ship which had been condemned* had actually performed the contract of the original affreightment, by carrying the cargo to the place of its destination. It had been objected on a former day, that as the decree of restitution had passed without any order respecting freight, it was not competent for the Court now to entertain a new suit on property which had actually been restored.

In answer to that objection, it was said that although a decree of restitution had passed, the proceeds had not been paid out of the Registry; that so long as they were in the custody of the Court, it was competent for the Court to make a new order respecting them.

It appeared that after the decree of restitution had passed, the proctor for the captor had entered a *caveat* in the Registry, warning the Registrar not pay out the proceeds. And then the demand for freight was instituted on the part of the captors. On the former day, when this was stated, the Court reserved the cause for further consideration on this part of the case

On this day. COURT.—I am of opinion, that the cargo still re-

maining in the hands of the Court, is subject to the order of the Court notwithstanding the decree of restitution which has passed. It was the intention of the Court (not being apprised of any further demand) that the proceeds should be paid out, but that decree has not been carried into effect. I must observe, however, in reference to what has been done in this case, that when there is a decree of the Court for restitution, it is not to be obstructed by the mere *caveat* of the party. Notice should be given to the Court, whose duty it is to look to the prompt execution of its decrees. If there is any delay interposed, it should be notified to the Court.

[*Registrar*.—Parties enter their *caveat* and warn me not to pay out the proceeds.]

COURT.—I think the party has no absolute right to do that. He may enter it provisionally and then come before the Court and state his reasons why the proceeds should not be paid out; but I cannot think that it is correct practice for the individual to stop the payment, absolutely and as long as he pleases, without the authority of this Court, or of any other Court which may legally interfere. It may be a fit subject for a general rule. At present, in this particular case, as the cargo is still in the hands of the Court, I am of opinion that it is subject to the order of the Court, and that the question is fit to be entertained.

Lawrence then contended, on the particular question in this cause, that the contract of freight justly inured to the benefit of the captor whenever the original contract of affreightment was fulfilled by the captor, and the neutral cargo was carried to its place of destination, under the same principle and by the same rule of equity by which the demand was not sustainable on the part of the captor, when the original voyage was interrupted. The case of *The Vreysheid* (Lords, April 23, 1784) before the Lords was relied on, in which the captors were allowed freight for a cargo of fish carried to Leghorn, its original port of destination.

The King's Advocate, on the other side.—Captors have no claim generally for freight on the neutral cargo restored. Claims of that sort can only be supported on the ground of some special service performed by which the cargo may be supposed to have derived benefit. The carrying the cargo to the place of its destination, is the common ground of such a claim; but it is not in itself alone sufficient to establish the demand, unless it is performed in such a manner as to render effectual service, by putting the claimant into

possession of the property. In this case the capture took place —, 1798. A claim was given for the cargo in 1799, when further proof was directed to be made. From that time the claimant was entitled to the possession; but the agents of the captors have detained the proceeds in their hands till they were assigned to bring them into Court in January, 1801. The cargo was undoubtedly carried to the place of its destination, but not for the benefit of the claimants, nor delivered to their consignees. It has been kept in the hands of the captors ever since. All benefit that might have been derived from an arrival at the port of destination, has been counteracted and frustrated by this conduct. On these grounds, the claimants apprehend they are not liable to pay freight to the captor.

JUDGMENT.

SIR W. SCOTT.—This is the case of a ship which had carried a cargo of corn to Lisbon, the original port of destination. In such a case I apprehend the rule to be that the captor is entitled to freight, and on the same principle on which he would be held not to be entitled where he does not proceed, and perform the original voyage. The specific contract is performed in the one case, and not performed in the other. It is the rule of practice laid down in the case of *The Vreyheid*—a case perfectly within my recollection as a case very deliberately considered at the Cockpit. It is conformable to the text-law, and the opinion of eminent jurists.—“*Quod additur de vecturæ pretiis solvendis*,” says Bynkershoek, Q. J. P. lib. 1, ch. 13, “*ejus juris rationem non adsequor. Satis intelligo, qui navem hostilem occupavit, etiam occupasse omne jus quod navi, sine navarcho debebatur, ob merces translatas in portum destinatum. Proponitur autem, navem in ipso itinere fuisse captam. Ecce igitur capienti solvam mercedes? Si qui cepit navem, eam cum mercibus in locum destinatum perducere paratus sit, ejus juris rationem intelligerem, ceteroquin non intelligo.*”¹

In the case of *The Vreyheid*, all the considerations that could be applied to this question were fully canvassed, and it was then recognized as the true rule, that the captor who has performed the contract of the vessel is, as a matter of right, and *de cursu* entitled to freight; although, if he has done anything to the injury of the property, or has been guilty of any misconduct, he may remain an-

¹ Bynkershoek is, in this passage, discussing the propriety of the regulation of the Consolato, c. 273. See *Collectanea Maritima*, secs. 6, 7, 8 of the 273rd chap.

swerable for the effect of such misconduct or injury, in the way of set-off against him.

The case then is reduced to a question, whether the captor, in this instance, has done anything to forfeit the right which, under the general rule, he had acquired? He had made a capture, which is fully justified by the condemnation of the ship, and by the order for further proof as to the cargo. He carried the cargo to Lisbon, where the consignee was put into possession, though informally and apparently without any shadow of right, by the hand of the Portuguese government. Such interference was however given at the suit of the consignee of the cargo, and by these means that consignee obtained possession of it.

Being a cargo of corn, it was necessary that it should be sold. The sale was entrusted to Mr. Paxton by the agreement of both parties, and under a condition, as it is stated, that the proceeds should remain in his hands till a sentence of final adjudication could be obtained. This gentleman is, therefore, to be taken as the common depositary of both parties. When it is said that the captor did not bring in the proceeds so soon as was required of him, we must consider whether it was in his power. The proceeds were left in the hands of this house at Lisbon with the consent of the consignee, and they have not been transmitted; so that what has been brought in, at last, is an advance, made out of the private funds of the captor. If there has been any error in these proceedings, it has been the common error of both parties. Under the circumstances of this case, I am of opinion that the captor has not forfeited the interest which he had acquired.

Freight decreed to the captor.

THE BREMEN FLUGGE, MEYER, MASTER.

November 7th, 1801.

[REPORTED 4 C. ROB. 90.]

CAPTURE OF ENEMY'S GOODS ON BOARD NEUTRAL SHIP.]—*Enemy's goods on board a neutral ship liable to capture, but the neutral ship will be restored.*

A neutral has a right to carry the property of the enemy, subject to the right of the belligerent to bring in the ship so employed, for the purpose of bringing the cargo to an adjudication: but the freight will attach as a lien on the cargo, which must be paid by the captor, provided there are no unneutral circumstances in the conduct of the ship to induce a forfeiture of this demand.

In general the expenses of the neutral master will be allowed, but they do not stand on the same ground as freight, decreed to be a charge on the cargo.

Expenses of neutral master will be postponed to the expenses of the captor, where the latter had obtained condemnation of the cargo, and was entitled to an indemnification for the expenses incurred by him.

This was a question respecting the remaining proceeds of a cargo, which had been condemned for want of further proof; *the ship having been restored as a neutral ship*, with freight and expenses decreed to be a charge on the cargo. The sum of £1,050 had been paid in discharge of the freight, and the question now was, whether the neutral master was entitled to the remaining sum, being not more than £50, under the decree for his expenses; or whether the captor had not a prior claim to it, to defray the expenses which he had necessarily incurred.

Lawrence, on the part of the claimant, contended that the neutral had a right to his freight, in the first instance, as a lien attaching on the cargo at the moment of capture; and that he was further entitled to the expenses of adjudication, to which he was brought by the captor without any justifiable cause.

JUDGMENT.

SIR W. SCOTT.—This is a question concerning a remnant of a cargo left in the Registry, which has been condemned for want of further proof, after the neutral owner of the ship had obtained a sentence of restitution of the vessel, with freight and expenses, decreed to be a charge on the cargo. It is true such a decree passed; but this decree of freight and expenses is not to be taken as exclusive of all further orders of the Court respecting the cargo, nor as giving a decided preference of payment to the exclusion of other just claims upon it, if the fund should prove insufficient to satisfy all demands.

On general principles, when condemnation has been obtained,

the captor's claims appear to have rather the advantage. It has heretofore been a question of doubt, whether the neutral vessel can lawfully carry the property of a belligerent at all. The modern rule, and indeed an ancient rule of this country, has been established on more liberal principles; and it is now held almost universally, *that the neutral has a right to carry the property of the enemy, but subject to the right of the belligerent to bring in the ship so employed, for the purpose of bringing the cargo to adjudication.* It is now, I say, generally held, that a neutral vessel so engaged is not exposed to any penalty at all, but that she is entitled to her freight, as a lien attaching on the cargo. The captor takes *cum onere*. The freight attaches as a lien which he must discharge by payment, provided, as it must always be understood, that there are no un-neutral circumstances in the conduct of the ship, to induce a forfeiture of this demand. But the expenses of the neutral master appear to stand on a somewhat different footing. As to them this distinction seems to present itself, supposing the law to be, that the neutral ship is liable to be brought in; if she can carry the property of the enemy lawfully on that condition only, I do not know that she is entitled to the expenses incurred in consequence of being so brought in.

Putting practice out of the question, which has established an indulgent rule, it does not appear that the neutral master would, as a principle merely, be entitled to an indemnification for expenses so incurred. He is bound to know the condition annexed to his right, and to abide the consequences. A more favourable practice has obtained, under which his expenses are usually allowed, and this practice the Court will be disposed to sustain, as far as it does not interfere with other rights, equally protected by practice, and more strongly protected by principle. But it is not a claim which the neutral master is entitled to urge against the captor, as a right equally original and equally vested in him, and in the same manner as freight is vested, by the receipt of the cargo on board and the performance of the contract of the conveyance. It is said that the cargo was condemned, not as enemy's property, but for want of further proof, and the attestation of the asserted owner. Can that make any difference? The legal conclusion will be the same, that condemnation passed, because it was not proved to be the property of the neutral claimant; the want of proof of neutral property induces the legal conclusion, that it is the property of enemies. The captor is as much entitled as if the cargo had been condemned on

affirmative grounds, and in the first instance on positive evidence, that it was the property of the enemy. On these considerations, I think the captor is entitled to the priority.

The money decreed to be paid to the captor.

THE SANTA CRUZ, PICOA, MASTER.

December 7th, 1798.

[REPORTED 1 C. ROB. 49.]

RECAPTURE FROM THE ENEMY.]—*The law of England, on recapture of property of allies, is the law of reciprocity; it adopts the rule of the country to which the claimant belongs.*

This was the case of a Portuguese vessel, taken by the French on the 1st of August, 1796, and retaken by English cruisers on the 28th, after being a month in the possession of the enemy: it was *the leading case* of several of the same nature, as to the general law of recapture between England and Portugal.

For the captors, the *King's Advocate* and *Lawrence*.—This is the case of a Portuguese vessel, taken by the French on the 1st of August, and retaken by English cruisers on the 28th. The French had sent away or destroyed the papers, so that there did not appear sufficient proof of the property; but all inquiry upon that point is superseded by a consideration of law. In the opening, on a former day, the whole case was distinctly placed on the authority of the decision in *The San Iago*; and the principle of reciprocity which determined that case was so readily admitted by the Court, that the parties were immediately referred to produce evidence respecting the law and practice of Portugal on the subject of recapture: the principle of law, therefore, must be held to be established; the evidence of the fact is now before the Court. On the part of the captors, it consists not of ordinances and expositions of ordinances,

but of acts which no argument can affect: they appear in the proceedings of the Court of Portugal on two British ships, *The Anne* and *The Endeavour*, which, coming out of the hands of the French into the possession of Portuguese subjects, were claimed for the original owners, but were condemned as lawful prize.

On these grounds, on the authority of the law of Portugal, it is submitted this vessel must be condemned to the British captors.

For the claimant, *Arnold and Sewell*.—This is a case which respects the property of an ally, recaptured from the common enemy; and the question is, why restitution should not pass to the original proprietor? On all general reasoning, and the principles of common equity, it is a demand that seems to admit of no opposition; but it is still more strongly supported by the ancient law of Europe, and the daily practice of these Courts. In respect to the time when property is to be deemed converted by capture, the ancient law of Europe, Consol. del M. C. 287, Bynk. Q. J. P. lib. i. c. 4 & 5, held that a bringing *infra præsidia* was absolutely necessary to fortify the possession of the captor, and divest the original proprietor of his claim. Some nations have, indeed, by later regulations, substituted a possession of twenty-four hours as a state of sufficient security, but it is an alteration which does not appear to be founded on any rational principle; and, what is of more importance to the present argument, it has never been admitted into the practice of these Courts;¹ for this country has ever

¹ It is asserted by Grotius, b. iii. c. 6, s. 4, note 7, on the authority of Albericus Gentilis, b. i. c. 3, that England was among the nations that had adopted the rule of twenty-four hours in prize matters; but the passage in A. Gentilis is no authority to this effect, as it is taken from the chapter treating especially *de judicio militum*, and the practice of different nations in respect to military booty, which Gentilis himself contends stands on different grounds from maritime prize; on which latter point he maintains that it was necessary, *et ut capta sit, et perducta infra præsidia*. In respect to military booty, the law of England appears to have held anciently, "that if an enemy dispossessed an Englishman, and another Englishman took the booty from the enemy, the former owner shall lose his

property so gained in battle, unless he comes and claims in the same day, *ante occasum solis*, and neither the king, nor the admiral, nor the former owner shall have any claim to it." 7 Ed. IV. 14. In 'Crompton's Jurisdiction of Courts' this is cited under the chapter on the High Steward, Constable, or Marshal's Court; and although the word "Admiral" is used, both the original dictum in 'The Year-book,' and the passage to which it is applied, relate to land capture. It is not improbable that the principle might be common to maritime as well as military capture; but the authority cited by Grotius does not ascertain it. In the early periods of English history, 31 Ed. III., and again 2 Hen. IV., two instances occur in which it is maintained, against Portugal and Prussia, that capture from

resisted the innovation, and adhered strictly to the old rule as a fundamental principle of its Prize Law. But, it may be said, this practice stands upon the regulations of our Prize Acts; the acts, however, but carry into effect the principles of the old and general law; and were they even in this respect matters of novel institution, whilst they prescribe a law to British subjects, they would create an equitable right for our allies to have the benefit extended to them; and, in fact, the right to restitution, on whatever ground it is founded, has always been acknowledged in the practice of this Court.

the enemy was sufficient to vest the property, even of goods, before taken from a neutral (Rym. Fœd. v. 6-14, vol. viii. p. 203); but there is no mention of the rule of twenty-four hours. It is not impossible, however, that Grotius might be in some degree justified in his fact, on more recent authority, and more immediately pointing to the doctrine of twenty-four hours; for soon after the publication of his work, and before the additional notes were added by him in his later editions, the question is asserted to have been mooted in England, and settled in this manner. In Thurloe's State Papers, vol. iv. p. 589, there is a specific assertion of the Dutch Resident, in 1656, "that after many suits, and afterwards appeals had in the Council of the King, *anno 1632*, it was understood that *jure post-liminii* no ships ought to be restored which had been twenty-four hours in the power of the taker." But *quare*—so soon afterwards as 1672, we have the testimony of the then Judge of the Admiralty, Sir *L. Jenkins*, that he could find no traces of it in the earliest part of that century; his words will show that it was not practised during the usurpation, nor acknowledged afterwards by him.

On a case referred to him by the King, he reports:—"In England we have not the letter of any law for our direction; only I could never find that this Court of Admiralty, either before the late troubles or since your Majesty's happy restoration, has in these cases adjudged the ships of one subject good prize to another; and

the late usurpers made a law, in 1649, that all ships rescued, whether by their own men of war or by privateers, should be restored on paying one-eighth salvage, without any regard to the time such ship had been in possession of the enemy, or to any other circumstances, unless the ship taken were made a man-of-war by the enemy; and in that case a moiety went for salvage, but the ship was still to be restored. Whether the usurpers intended this as a novelty or an affirmance of the ancient custom of England, I will not take upon me to determine; only I will say, condemnation upon the enemy's possession for twenty-four hours is a modern usage." Life of Sir L. Jenkins, vol. ii. p. 770.

In Holland the rule had prevailed, and was abrogated by Ord. 11, March 1632. Groenwegen, De Leg. Abr. Dig. l. 49, tit. 15.

In France it is spoken of in an Ordonnance of 1557 as an ancient rule; and an Edict of King Henry issued at that time to restrict it still further to twelve hours, "for the purpose of stimulating cruisers to recover captured property before it was carried into the enemy's ports;" as, it was said, might easily be done in eight or nine hours, owing to the proximity of the English coast. The Parliament refused to sanction the alteration, and the old rule was retained. Ter. p. 565.

This ordonnance shows the true spirit of the rule, and marks it as a private regulation of expediency rather than as a rule containing in it any rational principle of public law.

In the present war, there have been many cases relating to several of our allies, in which it has been so adjudged; there are some relating particularly to Portugal; and others may be produced from the earliest parts of the present century. In 1703, *The Saint Catherine*; in 1707, *The Blackiston*—both Portuguese vessels—were restored, on recapture, after having been many days in the possession of the enemy, but never carried into ports. In the present war, *The Memphis*, *The Minerva*, *The Joachim d'Aloa*, all Portuguese vessels, have been restored without opposition, and sufficiently establish the law of this country to be towards allies, as well as towards British subjects, a law of restitution on salvage.

But between Portugal and this country the rule has also been recognized and confirmed by treaty. By the treaty of 1654, Art. 19, the two countries bind themselves to "restore prize goods brought into the ports of either by an enemy;" and therefore they must, *à fortiori*, be bound to restore, in recaptures arising from the operation of a joint and common war. It is said, however, that these equitable principles, and the established practice of this Court, must now give place to a minute reciprocity—to an inquiry into the law of Portugal, and into the fate of each individual case which has occurred before the tribunals of Portugal on the subject of recapture; and on this point the whole argument rests on the case of *The San Iago*. But without impeaching the justice of that decision, it may be allowable to deprecate the application of it as a general rule of law: it was not so pronounced, nor in that extent; it respected a different country; it is a single case, and remains at present unsupported by any series of decisions to establish the principle of it to be an universal principle of prize law. The name and character of England seem to require that such a country should administer justice by a firm adherence to principles which it has itself approved, rather than by occasional references to foreign codes. The inconvenience of resorting to the law of foreign countries amounts in some points of view almost to an absurdity: we shall have rather a medley of particular cases than a rational and consistent train of legal decisions. Shall England take its law from Tunis or Algiers? or shall it be left, as such a principle may leave it, to the weakest and worst governed state to give the law to the rest of Europe?

But even in respect to the fact which has been made the subject of inquiry in this case, the claimant has nothing to apprehend: it is certified on the best authority, on the authority of eminent

lawyers, and of the principal persons in the government of Portugal, that there was no law on the subject of recapture in that country before the ordinance of December, 1796. The Judges of the Court of Admiralty make this declaration, and further certify, that there had been no instance in which recaptured British property had been condemned in Portugal;” and “that considering the practice of England, and the treaty between the two countries, they should have restored British property in a similar situation;” such, then, was the state of the law of Portugal when the recapture was made. The ordinance of December, 1796, which declares ships recaptured after a possession of the enemy for twenty-four hours to be lawful prize, is in respect to this case an *ex post facto* law. If that ordinance is applied to the present case, the later ordinance of May, 1797, which directs restitution, must likewise be applied; but it is still further observable, on the ordinance of 1796, that it relates only to the ships and subjects of Portugal.

A particular explanation has also been given of the circumstances of two cases which have been cited on the part of the captors, as a proof of the law of Portugal; and it appears, that in these the claimants failed of redress, the one by applying to an incompetent jurisdiction, and the other by relinquishing his claim. In the certificate of the Judges, it is stated that *The Endeavour* was carried before an incompetent jurisdiction; that the decision was founded on wrong principles; and that there has been an order given for rehearing the cause before the proper Court.

In *The Anne*, the certificate gives this statement of the proceedings:—“The British master had obtained an embargo on the vessel, which, on application by the Portuguese master, was taken off by the Secretary of State; the British claimant then deserted his claim, whilst he was still entitled to bring it before the Court.” The Secretary of State also certifies, “that the order given by him to remove the embargo was not intended to obstruct the claim, or prejudice the final decision of the cause.” There is nothing then in either of these cases that can be admitted as proof of the law of Portugal as it is administered by the proper Courts; the Judges of those Courts declare, “there was no law by which they should have condemned,” but, “that they should have restored British property under similar circumstances;” and this statement of the law has received additional confirmation from the subsequent act of the state: for since the circumstances of the present war have called for more explicit declaration of the laws of prize, all doubt has been

removed from this question by an ordinance, which expressly directs restitution of the property of allies on the payment of one-fifth salvage. On these considerations therefore, of the equity of the case, of the laws and practice of England, and of the rules observed in Portugal, the claimant stands entitled to restitution on the accustomed salvage.

The King's Advocate and *Lawrence*, in reply.—Under the authority of *The San Iago* it is now unnecessary to argue the rule of reciprocity. It will be sufficient to observe, that it was not laid down in that case as novel in principle or limited in application: it stands on a principle of natural equity, which must ever prevail between parties acting freely in support of their own rights, and independent of any common control. The Judges themselves recognize the principle when they say, "that looking to treaties, and the practice of England, they should have restored." In respect to the treaty of 1654, it is clear that it has not been considered by this Court as applicable to decide the present question; for if it were so, reference would not have been made for information on the rule and practice of Portugal: it is a treaty which refers evidently to a state of neutrality in one party, and therefore does not apply to the cases of a common war.

If it is to be applied by inference or construction, the true meaning of an ancient treaty will be best sought in the practice which has been observed under it. It is attempted to confound principle with the evidence of fact, but the principle of reciprocity being established, the fact only is known to be examined. The opinions and explanations of lawyers can avail nothing against the clear fact, that Portugal has condemned British property under similar circumstances. It is besides observable, that these opinions and certificates do not assert that there was no law, but that there was no positive law. In this doubtful state of their law, the practice of the Courts of Portugal will be the best guide. The public Courts of Lisbon, acting, as appears, under a communication with the Cabinet of Lisbon, have in two cases adjudged British property coming out of the hands of the enemy to the recaptor. On these grounds it is submitted, this vessel must be condemned.

THE COURT, after the argument in *The Santa Cruz*, desired to hear the distinctions that were to be taken in favour of, or against the remaining cases.

On *The Santa Reta*, taken on the 12th of March, 1797, and retaken on the 20th, it was argued for the captors, that subsequent

to the ordinance, 1796, the law was still stronger and more clear on this point than it was in the preceding cases; for that ordinance expressly declared all recaptures after a possession by the enemy for twenty-four hours to be lawful prize.

For the claimant it was contended, that the ordinance of December, 1796, related solely to the Portuguese cases, and left the general law towards allies on the ancient footing; that the only operation which this ordinance could have was favourable to the claimants, as it served to prove that the general law before that time had not led to condemnation.

In the remaining cases, retaken after the ordinance of May, 1797, it was contended on the part of the captors, that the government of Portugal having established a general law, and acted under it, was not at liberty to alter this rule during a war; that such changes were introduced from the fluctuations of their own views of interest, and not from any fixed principles of justice; and therefore that they were such alterations as an ally was not bound to admit.

JUDGMENT.

SIR WM. SCOTT.—These are cases of Portuguese ships or cargoes, eight in number, which have been recaptured at different times by British cruisers.

As far as the dates of the recaptures are material, they are to be distinguished under three periods:—The first vessel was recaptured before the month of December, 1796, when an ordinance on the subject of recapture passed in Portugal; the second was retaken between the months of December, 1796, and May, 1797, when another ordinance took place more expressly respecting the property of allies recaptured from the enemy. The rest may be stated generally, without further distinction, to have been taken subsequently to the 9th of May, 1797. It is necessary to distinguish these dates, as it is said the difference of date may affect the application of the general principle, whatever that may be, to the particular cases.

They are cases of very considerable value, of much importance, and of no mean difficulty in many respects. Under a choice of cases they are not such as I should particularly wish to determine; but they devolve on me in the regular course of my duty, and I am bound to decide them according to my own best informed apprehensions of law and justice of the general law of nations, as it has been understood and administered in the British Courts of Admiralty.

In the arguments of the counsel, I have heard much of the rules which the law of nations prescribe on recapture, respecting the time when property vests in the captor ; and it certainly is a question of much curiosity, to inquire what is the true rule on this subject ; when I say the true rule, I mean only the rule to which civilized nations, attending to just principles, ought to adhere ; for the moment you admit, as admitted it must be, that the practice of nations is various ; you admit there is no rule operating with the proper force and authority of a general law.

It may be fit there should be some rule, and it might be either the rule of immediate possession, or the rule of pernoctation and twenty-four hours' possession, or it might be the rule of bringing *infra præsidia*, or it might be a rule requiring an actual sentence of condemnation. Either of these rules might be sufficient for general practical convenience, although in theory perhaps one might appear more just than another ; but the fact is, there is no such rule of practice ; nations concur in principle indeed, so far as to require firm and secure possession ; but their rules of evidence respecting the possession are so discordant, and lead to such opposite conclusions, that the mere unity of principle forms no uniform rule to regulate the general practice. But were the public opinion of European states more distinctly agreed on any principle as fit to form the rule of the law of nations on this subject, it by no means follows that any one nation would lie under an obligation to observe it.

That obligation could arise only from a reciprocity¹ of practice in other nations, for from the very circumstance of the prevalence of a different rule among other nations it would become not only lawful, but necessary, to that one nation to pursue a different conduct ; for instance, were there a rule prevailing among other nations, that the immediate possession and the very act of capture should divest the property from the first owner, it would be absurd in Great Britain to act towards them on a more extended principle ; and to lay it down as a general rule that a bringing *infra præsidia*,

¹ This principle of reciprocity is acknowledged as a necessary principle of public law by Valin :—" . . . Me feroit penser, que les alliés qui aux termes de notre article, ont droit de réclamer leurs effets repris sur des pirates par des François, ne doivent s'entendre que de ceux qui suivent le même jurisprudence que

nous ; autrement, il n'y auroit pas de réciprocité : ce que blesseroit l'égalité de justice, que les états se doivent les uns aux autres." Valin, l. iii. tit. 9, art. 10.

See also the same principle adverted to in a case arising on this practice of France. Life of Sir L. Jenkins, vol. ii. p. 744.

though probably the true rule, should in all cases of recapture be deemed necessary to divest the original proprietor of his right ; for the effect of adhering to such a rule would be gross injustice to British subjects ; and a rule from which gross injustice must ensue in practice, can never be the true rule of law between independent nations : for it cannot be supposed to be the duty of any country to make itself a martyr to speculative propriety, were that established on clearer demonstration than such questions will generally admit. Where mere abstract propriety therefore is on one side, and real practical justice on the other, the rule of substantial justice must be held to be the true rule of the law of nations between independent states.

If I am asked, under the known diversity of practice on this subject, what is the proper rule for a state to apply to the recaptured property of its allies ? I should answer, that the liberal and rational proceeding would be, to apply in the first instance the rule of that country to which the recaptured property belongs. I admit the practice of nations is not so ; but I think such a rule would be both liberal and just to the recaptured ; it presents his own consent, bound up in the legislative wisdom of his own country ; to the recaptor it cannot be considered as injurious. Where the rule of the recaptured would condemn, whilst the rule of the recaptor prevailing amongst his own countrymen would restore, it brings an obvious advantage ; and even in the case of immediate restitution, under the rules of the recaptured, the recapturing country would rest secure in reliance of receiving reciprocal justice in its turn.

It may be said, what if this reliance should be disappointed ? Redress must then be sought from retaliation ; which in the disputes of independent states, is not to be considered as vindictive retaliation, but as the just and equal measure of civil retribution : this will be their ultimate security, and it is a security sufficient to warrant the trust. For the transaction of states cannot be balanced by minute arithmetic ; something must on all occasions be hazarded on just and liberal presumptions.

Or it may be asked, what if there is no rule in the country of the recaptured ? I answer, *first*, this is scarcely to be supposed ; there may be no ordinance, no Prize Acts immediately applying to recapture, but there is a law of habit, a law of usage, a standing and known principle upon the subject, in all civilized commercial countries : it is the common practice of European states, in every war, to issue proclamations and edicts on the subject of prize ; but

till they appear, Courts of Admiralty have a law and usage on which they proceed, from habit and ancient practice, as regularly as they afterwards conform to the express regulations of the Prize Acts. But *secondly*, if there should exist a country in which no rule prevails, the recapturing country must then of necessity apply its own rule, and rest on the presumption that that rule will be adopted and administered in the future practice of its allies.

Again, it is said that a country applying to other countries their own respective rules, will have a practice discordant and irregular. It may be so, but it will be a discordance proceeding from the most exact uniformity of principle; it will be *idem per diversa*. It is asked also, will you adopt the rules of Tunis and Algiers? If you take the people of Tunis and Algiers for your allies, undoubtedly you must; you must act towards them on the same rules of relative justice on which you conduct yourselves towards other nations. And upon the whole of these objections, it is to be observed, that a rule may bear marks of apparent inconsistency, and nevertheless contain much relative fitness and propriety. A regulation may be extremely unfit to be made, which yet shall be extremely fit, and shall indeed be the only fit rule to be observed towards other parties who have originally established it for themselves.

So much it might be necessary to explain myself on the mere question of propriety; but it is much more material to consider what is the actual rule of the maritime law of England on this subject. I understand it to be clearly this: that the maritime law of England, having adopted a most liberal rule of restitution on salvage, with respect to the recaptured property of its own subjects, *gives the benefit of that rule to its allies till it appears that they act towards British property on a less liberal principle*: in such a case it adopts their rule and treats them according to their own measure of justice. This I consider to be the true statement of the law of England on this subject. It was clearly recognized in the case of *The San Iago*—a case which was not, as it has been insinuated, decided on special circumstances, nor on novel principles, but on principles of established use and authority in the jurisprudence of this country. In the discussion of that case, much attention was paid to an opinion found amongst the manuscript collections of a very experienced practitioner in this profession (Sir E. Simpson), which records the practice and the rule as it was understood to prevail in his time. “The rule is that England restores, on salvage, to its allies; but if instances can be given of British property retaken by

them and condemned as prize, the Court of Admiralty will determine their cases according to their own rule."

I conceive this principle of reciprocity is by no means peculiar to cases of recapture; it is found also to operate in other cases of maritime law. *At the breaking out of war it is the constant practice of this country to condemn property seized before the war, if the enemy condemns, and to restore if the enemy restores.*

It is a principle sanctioned by that great foundation of the law of England, Magna Charta itself,¹ which prescribes, that at the commencement of a war the enemy's merchants shall be kept and treated as our own merchants are treated in their country.

In recaptures, it is observable, the liberality of this country outsteps its caution; *it restores on salvage without inquiry, till it appears that the ally pursues a different rule.* It may be said, there may be inequality and hazard in this prompt liberality; and we may restore while the enemy condemns; and so the fact has been; for it is not to be denied that before the case of *The San Iago* had introduced a more accurate knowledge of the Spanish law, restitutions of Spanish property on recapture had passed of course; the more accurate rule however is that which I have laid down.

In the present state of hostility (if so it may be called) between America and France, the practice of this Court restores American property on its own rule, without inquiring into the practice of America. It acts on the same principle towards Danes and Swedes and Hamburgers,² in the ambiguous state in which the rapine of France has placed the subjects of these governments. Towards Portugal then undoubtedly a less liberal treatment would not be observed; connected by long alliance, by ancient treaties, by mutual interests and common dangers, if Portugal forfeits the benefit of a rule which has been before observed as a general rule, it can be only on this ground, that the Courts of that country have applied a different rule to the property of British subjects. The question then for the Court to determine will be simply this, Has Portugal applied a different rule to British property taken by the enemy, and coming out of their hands into the possession of Portuguese subjects?

¹ Art. 41. Omnes mercatores, etc. . . .
Et si sint de terra contra nos gwerrina, et
si tales inveniuntur in terrâ nostrâ in prin-
cipio gwerre, attachiantur sine dampno
corporum et rerum, donec sciatur a nobis,
vel Capitali Justiciario nostro, quomodo

mercatores terre nostro tractentur, qui
tunc inveniuntur in terrâ contra nos guer-
rina, et si nostri salvi sint, alii salvi sint
in terrâ nostrâ.

² Neutrals.

But before I enter on this inquiry, it may be proper to consider the treaties that subsist between the two countries ; because if they have prescribed a rule, it will render all further discussion unnecessary. A treaty to which much reference has been made thus strongly and emphatically, expresses the terms of union between the two countries. "Neither of the confederates shall suffer the ships and goods of the other, or of the people of either, which shall at any time be taken by the enemies of the one and carried into the ports of the other, to be conveyed away from the owners or proprietors ; but the same shall be restored to them or their attorneys, provided they claim them before they are sold or cleared, and prove the rights within three months, and pay the necessary expenses for preservation and custody." (Treaty, 1654, Art. 19.) Now I have no scruple in saying, this is an article incapable of being carried into literal execution, according to the modern understanding of the law of nations ; for no neutral country can interpose to wrest from a belligerent prizes lawfully taken ;¹ but I think it goes a great way to prove the spirit of the contracting parties : and I agree with Doctor Arnold, that it goes the whole length of the present claim ; for such a treaty of alliance is not a thing *stricti juris*, but ought to be interpreted with liberal explanations. And although it may seem to point more immediately to a state of things in which one of the contracting parties is neutral, yet it would be strange to say that it binds the party to seize, for the purpose of restitution, where there

¹ The notion of receiving restitution from a neutral power seems, soon after this treaty, to have been found to be inconsistent with the rights of belligerents, as acknowledged by the law of nations. Between the years 1666 and 1670 there is this report among the letters of Sir L. Jenkins (vol. ii. p. 732) :—"The question in law is, Whether this Biscainer, being brought into your Majesty's port, ought not on account of your Majesty being at amity with the Catholic King, to be rescued from under the power and force of his enemy ; and *jure postliminii* to be restored to his own. The law of nations, as it is at this day observed, seems not to pass any obligation on your Majesty to impart your royal protection with one friend to the prejudice of another ; this captor being *jure belli*, which is a very

good title, in full and quiet possession of his prize, and so he was for a fortnight together at Portsmouth before he was discovered, will take it for an act of partiality to have it now wrested out of his hands and given to his enemies ; whereas no man's condition is to be made worse than another's in a place that is reputed of common security, upon the public faith. Besides, the French ordinances do expressly provide that leave be given to all strangers to depart those ports with such prizes as they happen to bring in : it is the practice of Spain at this day, and of all other parts that I can learn anything of, in cases of neutrality."—A similar article to this referred to in the treaties with Portugal, is to be found in a variety of ancient treaties from the beginning of the fifteenth century.

is no right of seizure ; but it shall not oblige him to restore, when he has a complete right of seizure, and has already acted on that right. The treaty does therefore in its spirit and meaning embrace the restitution of property.

But then again, I am to inquire whether Portugal has put the same interpretation upon it? for if that government has used a different interpretation, that forms the rule which I must follow ; the case therefore upon the treaty comes exactly to the same question as the case upon the law. What has Portugal done? What acts are there from which we may collect the construction which Portugal puts upon the law and upon the treaty?

I come then to this important question on the fact:—On the original papers and depositions nothing appeared ; restitution therefore would have passed on salvage, according to what I have described to be the law of England ; but the captors offered papers to show that a different rule had prevailed in Portugal with respect to British property. In this state of doubt the Court ordered further information and proof to be produced respecting the law of Portugal on recapture, and by *both parties*. Now the first question is, who is more particularly expected to produce this proof? And it has been much pressed by the counsel for the claimant, that the *onus probandi* lies on the recaptors ; it lies with them, it has been said, to show that Portugal uses a different rule ; or at least to raise a strong presumption of that fact. But I am of opinion that the recaptors have sufficiently discharged their duty to the Court by the papers which have been produced.

The *onus probandi* then shifts, and it becomes a duty on the claimants to exonerate themselves from the presumption raised against them, and to show that their law is not such as the *primæ facie* evidence of the captors represents it to be.

They have besides great advantages in this research. The law and country are their own : access is easy to them. They have reason to expect all that the diligence, the acuteness, and the zeal of their countrymen can produce on their side ; but the captors must hunt out a foreign law, through a foreign language, and with the assistance of professors not much disposed to promote their inquiries. The means are evidently unequal between the parties ; and the means being unequal, the obligation is by no means equal. All defect of proof therefore must press principally on the claimants, from whom the Court is entitled to expect proof of the fullest and most satisfactory nature.

It has been asked, what proof must we produce? The question admits of an obvious answer. In the first place the Court will expect the text-law, the existing ordinances; now I think it does appear that there are ordinances on the subject which have not been produced. The ordinance of 1796 refers to an ordinance of the year 1704 as the basis on which it was framed. I have therefore a right to conclude that this ordinance has formed the subject of the Portuguese prize-law for a century; but yet no notice has been taken of it. In the next place information would be required respecting the decisions which have passed on their own recaptures; and if none such can be found, a certificate to this effect should be exhibited. But there is no certificate; besides, it is, I think, scarcely probable that there should not have passed some decisions on this subject previous to December, 1796. Portugal has been active in the war and the enemy has been active on those coasts; recaptures must have occurred; they must also have been brought to adjudication, and the rule by which they have been decided would have been considered by me as the law of Portugal.

It might have been expected also that authorities even more immediately in point might have been produced from decisions respecting the recaptured property of allies; some instances cannot but have occurred previous to May, 1797, when an edict issued on that subject. Three cases have occurred within three months after the edict, and afterwards many more; and it is scarcely probable that so many should have happened after that time, and none before. It has been suggested that the records of Portugal are not so kept as to furnish a ready answer to such inquiries; but I cannot admit an excuse so dishonourable to the tribunals of that great country; there is therefore a defect of evidence for which no sufficient reason has been given on the part of the claimants.

After this statement of the reasonable expectations of the Court, let us now see what evidence has been produced. It consists of many documents, of which some must be immediately dismissed, as of no use or authority in this case. Of these the first is a certificate from the Portuguese Minister Plenipotentiary at this Court. As far as character, truly honourable both in public and private life, can give weight to an opinion, as far as conviction that the party delivering that opinion delivers the sincere and unbiassed persuasion of his own mind, can influence me to respect it, this opinion must command the greatest attention; but the whole weight of this opinion is confined to these considerations; for it is

to be remembered that the Chevalier d'Almeida is not a professor of the law, but a diplomatic character; and therefore incompetent to instruct us in questions of law.

Another paper which I shall dismiss also, is an opinion of Mr. Da Sylva Lisboa, described to be a lawyer of considerable eminence in his own country. Upon this opinion many observations have been made, and more particularly on the impropriety with which it undertakes to explain to us the British laws of recapture, whilst it almost pleads ignorance of the Portuguese laws on the same subject. It is scarcely necessary to observe that the representation which it gives of our law is erroneous; it is besides very deficient in the preliminary circumstance which can alone give credit to it, or even make it intelligible to us; for it is not accompanied by any statement of the questions that were addressed to this gentleman. He could scarcely have imagined that the British Court of Admiralty would apply to Portuguese professors for information on British law; and we are at a loss to conjecture in what view he could suppose we should derive any knowledge of the law of Portugal from such an opinion; it would perhaps therefore be but due civility to the reputation of this gentleman to consider it as an opinion hastily obtained on an imperfect representation of the case; and under this character, as it can avail nothing in point of authority, I would recommend it to those who have to argue this case again, if it should go to an appeal, to dismiss this paper wholly from the case.

The last paper which I shall dismiss is the certificate of Mr. Nash, a reputable merchant of this town: this paper relates something of a transaction that has happened to Portuguese masters accepting from the enemy, by donations, ships taken from the Portuguese, and states that "The enemy had captured a number of vessels, some Portuguese and some English; and willing to disencumber themselves of their prisoners, they gave to the Portuguese and English masters, jointly, one of the Portuguese ships: on carrying their present into Portugal, these persons are represented to have been severely treated, and to have been imprisoned by the government." I am at a loss to understand this account, when I recollect the cases of *The Anne* and *The Endeavour*, unless I am to suppose that this severity was practised on them subsequently to the last ordinance, which pronounced such donations null and void; for otherwise I must suppose that donations of Portuguese property were considered void, whilst similar donations of British property

were held to be perfectly good and valid: the same paper informs us, further, "that the Portuguese masters remitted to England, to the captains of the English vessels, a part of the proceeds as their share of the donation." I am sorry for it, because the property belonged not to either party, but to the former Portuguese owners; and no interest could accrue to those masters but an ordinary salvage on restitution to the original proprietors.

This certificate cites also, as a sort of precedent, the acceptance of four pipes of wine in the same manner by an English Captain Bennet. It would be ridiculous to treat the conduct of this man as an authority; it was an irregular proceeding, and as irrelevant to this case as the former parts of this certificate.

Laying aside, therefore, these several documents, I come now to examine those papers which may be considered as matter of evidence in the case: there are on the part of the claimants, 1st, opinions of Portuguese lawyers; 2nd, a certificate of the Judges of the Supreme Court of Admiralty in Portugal; 3rd, the decree of the Queen of Portugal, November, 1797, in the case of *The Anne*; and, 4thly, a certificate of the Foreign Secretary of State of that country, Mr. Pinto de Souza. But it is scarcely possible to consider the effect of these documents, without bringing under our view those, at the same time, which have been brought in by the captors; these are the ordinances of December, 1796, and of May, 1797; and the proceedings relative to the British ships, *The Anne* and *The Endeavour*.

In the ordinance of December, 1796, no mention is made of the recaptured property of allies. The ninth article refers only to their own recaptures; but a reasonable presumption arises from it, that they would apply the same law to their allies; for this principle is not only liberal and just, but it is actually observed in the practice of England, France, and Spain: a presumption therefore arises, that Portugal would pursue a similar rule. But I think there are two circumstances which convince me, beyond mere presumption, that Portugal did act on this principle, and did mean to apply its own rule to the cases of allies. In the case of *The Endeavour*, which concerned the property of an ally, the sentence was in these words:—"Having heard what has been alleged concerning the rule of twenty-four hours, it appears to us that that rule serves only to regulate the right of actions arising on recapture." Now, certainly, if this rule on recapture did not apply to the property of allies, it would have been entirely irrelevant to discuss that rule in such a

case. We may infer therefore, I think, that the rule of twenty-four hours' possession was the rule of Portugal, and also that, had the case of *The Endeavour* been considered as a case of recapture, it must have been governed and decided by that rule. The manner in which Portugal has acted on the last ordinance confirms me also in supposing that it was the practice of Portugal to extend its own rule to the cases of allies. The salvage there ordained for Portuguese property is one-fifth, and this proportion has been observed also in subsequent cases of British property, although it is not the proportion of salvage which our own law prescribes. I may, therefore, conclude it was the practice of Portugal to apply its own law to the case of an ally.

But, it is said, this rule of twenty-four hours' possession had not prevailed in Portugal before the ordinance of 1796; and therefore I may presume that ancient ordinance was fundamentally the same. Had there been a difference so material, it was the duty of the claimant to have produced that ordinance for the information of the Court, and to have convinced us that the modern practice was a change and an alteration in the jurisprudence of Portugal. It cannot, indeed, be supposed that an alteration so monstrous, so gigantic, so opposite to the general course of the relaxations which have gradually taken place in the law of prize during this century, should have found its way into the Courts of Portugal, and have been adopted by them for the first time in 1796. We know it to have been the ancient law of Spain. The vicinity of the two countries, their affinity of habits, the resemblance of their legal institutions, still further strengthen the probability that this rule had also been the ancient law, or at least the usage of Portugal on this subject.

I consider myself, therefore, justified to conclude that the *law of Portugal established twenty-four hours' possession by the enemy to be a legal divestment of the property of the original owner, and also, that it would have applied the same rule to the property of allies.*

But, I acknowledge, it is not sufficient to say such a rule would have been applied. It is also necessary to show that there have been actual proceedings under it; and for that purpose two cases have been produced—the cases of *The Anne* and of *The Endeavour*.

The case of *The Endeavour* was, I believe, prior in time. It was the case of a British ship taken by the French on the 24th of January, 1796: the French captain gave it to the master of a

Portuguese vessel which he had also taken; the ship was carried into Portugal; the English master demanded restitution, but it was denied to him, not only by the individual, but also by the Courts of Justice of Portugal. The case of *The Anne* happened in September, 1796, and is in one respect still stronger than that of *The Endeavour*, as it was a ship given in the same manner by the French captor to the very man who had been the master of this vessel, *The Santa Cruz*. Let us suppose the master had been also the owner of *The Santa Cruz*: by what justice could he have claimed to have his own property restored from British hands, at the same time that his own law confirmed him in his refusal to restore British property under circumstances precisely similar? But restitution was refused, under a particular order of the state, which declared "the property of the English owner had been divested, and that the title of the Portuguese owner was good and valid."

Now these are two cases strongly in point; and unless they can be overthrown, they will, I think, sufficiently establish this fact—that it was the practice of the Courts of Portugal, either under ancient ordinance or under a silent and prevailing usage, or under some recent edict, to confiscate the property of allies coming into the possession of Portuguese subjects from the hands of the enemy. It is immaterial under which of those authorities the practice prevailed. These decisions are represented to us to be the only decisions that have passed during the present war on that subject, and they therefore establish the law of Portugal, from whatever sources it might be derived.

But the force of these cases has been attacked in different ways. It is said, in the first place, that they were cases not of recapture, but of donation; and it has been attempted to raise distinctions between these titles; but in all legal considerations they are precisely the same; they are both equally matter of prize: donation between enemy and enemy cannot take effect. The character of enemy at once extinguishes all civil intercourse, from which such a title could arise. So distinctly is this rule acknowledged to be the law of this country, that if a case should happen in which an enemy after capture had made a donation, as it is called, in this manner to the original owner, that vessel must be condemned as a *droit* or *perquisite* of Admiralty; and the original proprietor could acquire no interest but as *salvor*, or from the subsequent liberality of the Crown.

I think I have evidence also that this matter is so considered in Portugal. In the certificate of the Secretary, Mr. Pinto de Souza, he says, "The order given by him was not intended to suspend the suit of the English claimant, but only to dispose of that property which of right belonged to the Queen, as being acquired from the enemy without letters of marque." It is then under this description only the case of prize taken by a non-commissioned captor, and in this Mr. Pinto de Souza seems to coincide exactly with us in the view in which we should have considered it here. It has been said, however that the law of Portugal does distinguish between donations and recaptures; but it is sufficient to observe, that no proof has been produced of this assertion; and besides it is a distinction which cannot in the nature of things reasonably exist; nor indeed should I consider myself by any means bound to pursue a foreign law through a variety of minute or subtle distinctions, which at last might be found to exist only in theory. It would be sufficient for me to know, that I understand the practice as it has been administered in the only cases that have occurred on this subject.

But, it is said, these cases were decided before an incompetent tribunal; although, I believe, this objection applies only to *The Endeavour*; this objection however does not appear to have taken been by the Portuguese lawyers. In the order of her Sacred Majesty, it is said indeed, "the Council of Commerce had no jurisdiction to decide questions of this nature." But the certificates of the judges speak a different language; they say not that the jurisdiction was incompetent, but "that the sentence which had been given by the Board of Commerce was founded on frivolous and insufficient reasons, and that the party might have appealed." The terms used by them are just the terms which would have been applied to cases proceeding in their due and ordinary course.

In the case of *The Anne*, it is not, I think, pretended that the Court before which it was brought had not a competent jurisdiction; but it is argued against the British claimant, that he acquiesced in the decision when he might have appealed. But let us see what would have been his prospect of success. The hope which the Portuguese lawyers held out to him, is not founded on any opinion on the merits of his case, but on a point of form, "because the Order in Council had not been produced." Whilst the cause was under investigation, the supreme authority of the state interposed to inform the Court that the title of the Portuguese master was legal and valid. The Court of Justice assents to this authority,

and decides accordingly; and it is against a decision so deliberately pronounced, and so irregularly influenced by the supreme authority of the country, that this foreign claimant, the master of a small English vessel, is required to persevere: I must think it could not be expected of him.

Such are the observations which I think myself justified in making on the proceedings in these two cases: and after the general view which I have taken of the whole of this subject, it may be unnecessary to dwell more particularly on the minute parts of the several papers. It is, I think, clearly proved, that before the Ordinance of May, 1797, the courts of Portugal considered British property coming out of the hands of the enemy as subject to confiscation: in two instances such property was actually confiscated, not by remote and inferior jurisdiction, but in their highest courts, in the capital of the empire, and under the direction of the state. The Ordinance of 1797 cannot be applicable to pre-existing cases. I must determine all cases, as if they had come before me at the time of capture. The two former cases therefore, of this class, can receive no protection from this Ordinance.

Looking then to the conduct which Portugal had observed towards British property, and conceiving myself bound by the general laws of this country, and more particularly by the authority of the case of *The San Iago*, to proceed on strict principles of reciprocity, I have no hesitation in pronouncing the first two cases subject to confiscation.

I now come to the consideration of the subsequent cases. It has already been laid down, that the law of England restores no salvage, unless it is forced out of its natural course by the practice of its allies. In the preceding cases it has been reluctantly so diverted from its free course; but in May, 1797, it appears Portugal renounced the harsher principles, and adopted a more liberal rule; upon what ground then can it be contended, that this country must, in regard to those cases which have occurred subsequent to this Ordinance, follow the harsh and antiquated, in preference to the new and more lenient rule? It is said Portugal is not at liberty to make such an alteration in time of war; and that those who have once established a rule, must abide the consequences of it: but I see no one reason on which this exercise of legislation can be denied to an independent state.

It is said Portugal will then legislate for this country; and so must every country in some degree legislate for us, whilst Great

Britain professes to act upon the old principle, and adopt the law of its ally. In peace, it is allowed, such an alteration might be made; and why not in a time of war? There are no depending interests to be affected by it: it was an alteration as harmless to the world, as if it had been made in times of the most profound peace: but it is said, the law is not even now established on equal terms of reciprocity towards this country; the salvage which Portugal has decreed is one-fifth, whilst the law of this country restores on payment of a sixth only. Perhaps a rule more closely concurring with our own might have been more convenient: but the difference is not sufficient to justify this country in refusing Portuguese subjects the benefit of their alteration.

In professing to act on the law of our ally, we must do so for better and for worse.

I therefore restore the several vessels that have been taken since the Ordinance of May, 1797, on the salvage which Portugal has established, a salvage of one-eighth to ships of war, and one-fifth to privateers.

In the condemned cases, I order the expenses of the claimants to be defrayed out of the proceeds.

On the breaking out of war important questions arise as to how far property of the *enemy*, or of those considered as adhering to him, is liable to capture and confiscation. These questions it is proposed to consider in this note.

First of all it should be mentioned, that before war is declared a nation may lay an *embargo* upon the property of another nation within its territories. "Such a seizure is," to use the words of Sir *William Scott*, "at first equivocal; and if the matter in dispute terminates in reconciliation, the seizure is converted into a mere civil embargo, so terminated. That

will be the retroactive effect of that course of circumstances. On the contrary, if the transactions end in hostility, the retroactive effect is directly the other way. It impresses the direct hostile character upon the original seizure. It is declared to be *no embargo*, it is no longer an equivocal act, subject to two interpretations; there is a declaration of the *animus* by which it was done, that it was done *hostili animo*, and is to be considered as a hostile measure *ab initio*. The property taken is liable to be used as the property of persons trespassers *ab initio*, and guilty of injuries which they have refused

to redeem by any amicable alteration of their measures. This is the necessary course if no particular compact intervenes for the restitution of such property taken before a formal declaration of hostilities." *The Boedes Lust*, 5 C. Rob. 246; *The Gertruyda, De Vries*, 2 C. Rob. 211.

During the period that an embargo lasts, the Court cannot restore; because on due notice of embargoes it is bound to enforce them. It would be a high misprision in the Court to break them by redelivery of possession to the foreign owner of that property, which the crown had directed to be seized and detained for further orders. The Court acting in pursuance of the general orders of the state, and bound by those general orders, would be guilty of no denial of justice, in refusing to decree restitution in such a case, for it has not the power to restore. Its functions are suspended by a binding authority, and if any injustice is done, that is an account to be settled between the States. The Court has no responsibility, for it has no ability to act. 5 C. Rob. 245.

Assuming, however, a war to be declared, what right has one belligerent to confiscate the property of the other seized before the war? Upon this subject, it has been said by Sir William Scott, in the principal case of *The Santa Cruz*, to be the constant practice of this country to condemn property seized before the war, if the enemy condemns, and to restore if the enemy restores. "It is a principle," he

adds, "sanctioned by that great foundation of the law of England—Magna Charta itself, which prescribes, that at the commencement of a war the enemy's merchants shall be kept and treated as our own merchants are treated in their country." *Ante*, p. 792.

In modern warfare a certain time is generally allowed by Orders in Council, within which the subjects of the enemy may depart with their ships and cargoes, without being liable to capture on their voyage. See *The Phoenix*, 1 Spinks, 1; *The Argo*, *ib.* 52. But enemy's ships will not be allowed to protect themselves under such Orders in Council if they endeavour, under disguise, to pass themselves off as neutrals. *The Odessa*, 1 Spinks, 208, 213.

With regard to debts due to the enemy from individuals *before* the commencement of war, although the crown may have the prerogative of confiscating them, it has nevertheless never adopted such a course of proceeding as to enforce any debt due to an alien enemy from any of its subjects. "Nor," says a learned judge, "is it very probable, that such a course of proceeding ever will be adopted, as well from the difficulties attending it, as the disinclination to put in force such a prerogative." Per Lord Alvanley, C. J., in *Furtado v. Rodgers*, 8 B. & P. 201. In effect the right of the enemy-creditor to sue is suspended during the war, and revives upon the declaration of peace. See *Ex parte Boussmaker*, 13 Ves. 71; *The*

Nuestra Señora de los Dolores, Morales, Edw. 60; and see *ante*, pp. 607, 608.

Public debts due from one country to the subjects of a belligerent state, are not subject to confiscation upon the breaking out of war. In the answer to the Prussian memorial concerning the capture of Prussian ships, when the King of Prussia, by way of reprisals, had confiscated debts due from Prussia to English subjects on account of the Silesian Loan, it is stated "that it would not be easy to find an instance where a prince has thought fit to make reprisals upon a debt due from himself to private men. A private man lends money to a prince upon the faith of an engagement of honour, because a prince cannot be compelled, like other men, in an adverse way by a court of justice. So scrupulously did England, France, and Spain adhere to this public faith, that even during the war they suffered no inquiry to be made, whether any part of the public debts was due to the subjects of the enemy, though it was certain many English had money in the French funds, and many French in ours." Harg. Coll. Jurid. 154

On the breaking out of war the private property of the enemy on land was, according to the ancient law, seizable, and during the American war there were not wanting instances in which such property was seized and condemned by law, —not by the authority of the Court of Admiralty, but of another

court. That rigour was afterwards relaxed, and it is believed no instance has occurred from the time of the American war to the present day—in which *property inland* was subject to search or seizure, though no doubt it would be competent to the authority of the crown if it thought fit. Per Dr. *Lushington* in *The Johanna Emilie*, 1 Spinks, 14.

When hostilities are carried on by land in the territory of the enemy, as a general rule "private property is exempt from confiscation, with the exception of such as may become booty in special cases, when taken from enemies in the field or in besieged towns, and of military contributions levied upon the inhabitants of the hostile territory." Wheat. Internat. Law, 420.

With regard however to maritime warfare, operations are carried on with much more severity, and it is clear that "when two powers are at war they have a right to make prizes of the ships, goods, and effects of each other upon the high seas. Whatever is the property of the enemy may be acquired by capture at sea; but the property of a friend cannot be taken provided he observed his neutrality." Harg. Coll. Jur. 134.

Where the vessel of an enemy is taken having on board goods also belonging to an enemy, both the vessel and the goods will be good prize, but cases of a mixed character may occur; a neutral vessel may be taken with goods belonging to an enemy on board, and on the other hand a vessel of the

enemy may be taken having goods of a neutral on board.

It has always, until the late Russian war, been held by England that the goods of an enemy laden on the ship of a friend are liable to capture, but that the lawful goods of a friend on board a ship of an enemy must be restored.

The captor however of enemy's property on board a neutral vessel takes it with the freight attaching thereon *cum onere*. The rule of this country being, as is laid down in the principal case of *The Bremen Flugge*, "that a neutral has a right to carry the property of the enemy, but subject to the right of the belligerent to bring in the ship so employed, for the purpose of bringing the cargo to adjudication." *Ante*, 78. See *The Fortuna*, Edw. 57.

Where however there have been unneutral circumstances in the conduct of a neutral ship carrying enemy's property captured by a belligerent, as if it is carrying on the coasting (*The Atlas*, 3 C. Rob. 299) or colonial (*The Immanuel*, *ante*, p. 700; *The Rebecca*, 2 C. Rob. 101) trade of the enemy, if the ship is sailing with a false destination (*The America*, 3 C. Rob. 86), or if the owner has prevaricated or conducted himself otherwise in any respect with ill faith (*The Vrouw Henrica*, 4 C. Rob. 347), a forfeiture of the freight will take place.

The captor of enemy's property on board a neutral ship will only be bound to pay an adequate freight, and not necessarily the

freight named in the charter-party. For "the charter-party is not the measure by which the captor in all cases is bound, even where no fraud is imputed to the contract itself. When by the events of war navigation is rendered so hazardous as to raise the price of freight to an extraordinary height, captors are not necessarily bound to that inflated rate of freight as when no such circumstance exists; when a ship is carrying on an ordinary trade the charter-party is undoubtedly the rule of valuation, unless impeached; the captor puts himself in the place of the owner of the cargo and takes with that specific lien upon it." *The Twilling Riget*, 5 C. Rob. 82, 85.

The expenses of the neutral master, as is laid down in the principal case of *The Bremen Flugge*, do not stand upon the same footing as freight, but will be postponed to the expenses of the captors. See also as to the expenses of captors, *The Vrouw Henrica*, 4 C. Rob. 343, 347.

Where an enemy's ship is taken with neutral cargo on board, although the cargo will be restored, the owner will be liable to pay freight to the captor if the captor takes the cargo, as in the principal case of *The Fortuna*, to its original destination; but he will not be entitled to freight if he takes it to another destination. *The Hoop*, 5 C. Rob. 75, n.; *The Vrouw Anna Catherina*, 6 C. Rob. 269. There are two rules, says Sir Wm. Scott, "on this subject equally general. The first is, that if goods are not carried to their original destina-

tion within the intention of the contracting parties, freight shall not be due; and on this ground, that the contract not being completed either in substance or form, the speculation of the party has not been productive. The benefit of the contract is lost and the party has to provide another vehicle to carry on the goods to the port of their destination. In some cases indeed it may happen that the port to which the goods are brought may prove more beneficial and afford a better market. But the Court does not enter into the minutiae of such calculations, which would be attended with great trouble in the inquiry and much uncertainty in the result. It takes the presumption arising from destination only, and founds upon it the general rule that in such case the claimant shall receive restitution of his goods without the burthen of freight.

"The other rule, equally general, is, that when the contract is executed by bringing the cargo to the place of destination, the captor, to whom the vessel is condemned, shall be entitled to the freight which has been earned. He stands in the place of the owner of the ship, and is held entitled to the price of the services which have been performed in the execution of the contract. In some instances it may prove disadvantageous to the claimant; and it is certainly a clear inconvenience in all cases to be obliged to receive the goods under the process of a Prize Court, subject to the expenses which may

have been incurred, or to the delay of further proof, instead of taking them with more facility in the course of their original consignment. But on the same principle the Court declines, on this side also, to enter into a minute estimate of these circumstances, which must in every case branch out into particulars of infinite variety. It constructs a general rule on the same ground of presumption which it assumes on the other side, and decrees freight to be paid to the captor in the same manner as if the goods had been delivered under the original consignment." *The Diana*, 5 C. Rob. 71. In the case of the *Vrouw Henrietta*, on the claim of Mr. Ancrum, a merchant of London, a distinction was taken that the goods were not brought to London, but were delivered at Plymouth, and therefore that they had not been brought to the claimant's own port. The Court however overruled the distinction, and held the parcel of goods to be equally subject to freight. 5 C. Rob. 75 n.

Where however the voyage, although it has not been precisely that described in the contract, is that which the owners would have elected if not prevented and diverted by the overruling policy of another country, the captor of the vessel will be entitled to freight. See *The Diana*, 5 C. Rob. 67, 72. There Dutch colonial produce claimed by British merchants removing their goods at the commencement of war, was captured on board a Dutch vessel on its way to Holland under the compulsion

of Dutch ordinances, but with a final intention, according to the representations of the British merchants on their parts, to have their goods remitted either in specie or in proceeds to this country, to which they would immediately have consigned them if at liberty so to do, it was held by Sir *William Scott* that the captor having brought the goods in the captured vessel to London, was entitled to freight. "Looking at the substance of the case," said Sir *William Scott*, "and seeing that the parties have obtained restitution in their own country, and generally in the very port which they would have elected if they had not been diverted by an overruling necessity, I think it may be considered as coming under the second rule, or, if not under that, under another resting on nearly the same principles."

Where the captor has done any injury to neutral property captured on board an enemy's ship, or has been guilty of any misconduct, he may, as laid down in the principal case of *The Fortuna*, remain answerable for the effect of such misconduct or injury, in the way of a set-off against him. *Ante*, p. 778.

The expenses however of a neutral owner of cargo will not be defrayed out of the proceeds of the sale of an enemy's vessel on board of which such cargo was shipped. *The Primus*, 1 Spinks, 59.

Although England, in accordance with what is believed to be a sound principle of international law, has (at any rate until lately) invariably maintained that the goods of

an enemy are liable to capture although on board a neutral vessel, other nations have at different times strongly insisted that the flag should cover the cargo, or in other words have laid down as a maxim, "free ships, free goods." A stipulation to this effect was inserted in treaties between many nations before the commencement of the armed neutrality of 1780, the nations who adhered to which insisted, in the 2nd Article of their manifesto, "That the property of the subjects of belligerent powers should be free on board neutral ships, excepting goods that were contraband." This was not acquiesced in by England, although other nations had made so many treaties entering into the engagement, "that free ships make free goods," that, to use the words of a learned author, "it appeared to be the general wish of maritime powers that this practice should be adopted, and that it might probably become the conventional law of Europe, among those states, and only those states, which were entering into these engagements." He adds however (and this should be a caution to us not to rely too implicitly upon the stability of treaties on such subjects), "But such an opinion was soon proved fallacious by the result. Not fifteen years from the date of the armed neutrality, the wars with France had involved almost every European state; and the principle, which appeared obtaining such general prevalence, was abandoned by nearly all the members of the northern confede-

racy, the great leader of that alliance, Russia, being the chief instigator of the unusual severities which were adopted towards neutrals." Manning's Law of Nations, 271.

The armed neutrality of 1800, with Russia at the head, was alike unsuccessful in changing the rule upon which Great Britain had heretofore acted, and eventually a treaty was entered into with Russia (to which Denmark and Sweden afterwards acceded), by which it was agreed, "that goods embarked in the ships of neutrals shall be free, excepting contraband of war, and the property of enemies." Ib. 274-278.

France and some other nations, adopting the principle of "free ships, free goods," have also adopted the correlative principle of "enemy ships, enemy goods," according to which the goods of a friend on board the ship of an enemy will be confiscated. The two maxims, "free ships, free goods," and "enemy's ships, enemy's goods," have frequently been embodied together in the same treaty, although they are not necessarily connected, and the only merit which they seem to have is that they simplify judicial proceedings in questions of prize, and reduce the question to be determined by Courts of Admiralty to the simple point, What is the national character of the captured vessel?

Previous to the late war carried on by the English and French as allies, against Russia, it became necessary that their respective na-

vies should act upon the same rules in matters of prize. This was effected by means of a compromise, for while England, during the war, "waived the right of seizing enemy's property laden on board a neutral vessel, unless it were contraband of war," France, on the other hand, acceded to the principle that neutral property on board enemies' ships should not be liable to confiscation.

The same principle was adopted by the plenipotentiaries who signed the Treaty of Paris, the 30th March, 1856, by which it was declared that "the neutral flag covers enemy's goods, with the exception of contraband of war," Art. 2. "And that neutral goods, with the exception of contraband of war, are not liable to capture under enemy's flag," Art. 3.

Having already stated how far the property of persons who are clearly enemies is liable to capture, it will be necessary to examine how far persons and property may acquire a hostile character, although the former may not actually be, or the latter belong to, enemies strictly so called. For it has long since been clearly settled by numerous decisions, that there may be a hostile character merely as to commercial purposes, and that hostility may attach only to the person as a temporary enemy, or that it may attach only to property of a particular description. This hostile character, which subjects property to capture in the same way as if it belonged to one who was actually an enemy, may arise in various modes.

Where, for instance, in time of war a neutral or subject is carrying contraband of war (*The Jonge Margaretha, Klausen, ante*, p. 732 and note), is guilty of a breach of blockade (*The Frederick Molke, and The Betsey, ante*, pp. 749, 751, and note), resists the right of visitation and search (*The Maria, ante*, p. 643 and note), or carries on the colonial or coasting trade of the enemy (*The Immanuel and The Wilhelmina, ante*, pp. 700, 714, and note), or where a subject, or a neutral domiciled with a belligerent, trades with the enemy (*The Hoop, ante*, p. 673 and note): in all these cases their property engaged in such transactions will be liable to capture and confiscation.

The character of enemy for the purposes of capture extends to neutrals, or even the subjects of a belligerent domiciled with the enemy (*The Matchless, Vint*, 1 Hagg. 103; *O'Mealey v. Wilson*, 1 Camp. 482; *The Jonge Klassina, Bol.* 5, C. Rob. 297; *The Aina, Nystrom*, Spinks, 8; *The Johann Christoph, Bohss*, Spinks, 60; *The Johanna Emilie, Ontjes*, *ib.* 12, 15, 16; *Cremidi v. Powell*, 11 Moo. P. C. C. 88). Even a neutral residing in an enemy's country as consul, if he trades there, is considered as an enemy, and his property at sea is liable to capture. *Sorensen v. The Queen*, 11 Moo. P. C. C. 141. The reason why persons domiciled in a hostile country are treated as enemies is "that their persons, their lives, and their industry are employed for the benefit of the state under whose protection they live, and they pay their

proportion of taxes, imposts, and the like, equally with natural-born subjects." Wheat. Internat. Law, 395, 6th edit. It is however a very difficult question to determine what constitutes a domicile, as there is no universal agreement as to definition of the term, and the gradation from residence to domicile consists both of circumstances and intention. *Maltass v. Maltass*, 1 Robertson, Eccls. Rep. 75.

The term or duration of residence constitutes in a great measure the test as to whether a person is domiciled in a foreign country. "Of the few principles," says Sir *Wm. Scott*, "that can be laid down generally, I may venture to hold that time is the grand ingredient in constituting domicile. I think that hardly enough is attributed to its effects; in most cases it is unavoidably conclusive; it is not unfrequently said, that if a person comes only for a special purpose, that shall not fix a domicile. This is not to be taken in an unqualified latitude, and without some respect had to the time which such a purpose may or shall occupy; for if the purpose be of a nature that may probably, or does actually, detain the person for a great length of time, I cannot but think that a general residence might grow upon the special purpose. A special purpose may lead a man to a country where it shall detain him the whole of his life. A man comes here to follow a law-suit; it may happen, and indeed is often used as a ground of vulgar and unfounded reproach (unfounded as matter of just reproach,

though the fact may be true) on the laws of this country, that it may last as long as himself. Some suits are famous in our juridical history for having even outlived generations of suitors. I cannot but think that against such a long residence, the plea of an original special purpose could not be averred; it must be inferred in such a case, that other purposes forced themselves upon him and mixed themselves with his original design, and impressed upon him the character of the country where he resided. Suppose a man comes into a belligerent country at or before the beginning of a war; it is certainly reasonable not to bind him too soon to an acquired character, and to allow him a fair time to disengage himself; but if he continues to reside during a good part of the war, contributing, by payment of taxes and other means, to the strength of that country, I am of opinion that he could not plead his special purpose with any effect against the rights of hostility. If he could, there would be no sufficient guard against the fraud and abuses of masked, pretended, original, and sole purposes of a long continued residence. There is a time which will estop such a plea; no rule can fix the time *à priori*, but such a time there must be.

In proof of the efficacy of mere time, it is not impertinent to remark that the same quantity of business which would not fix a domicile in a certain space of time, would nevertheless have that effect if distributed over a larger space

of time. Suppose an American comes to Europe with six contemporary cargoes of which he had the present care and management, meaning to return to America immediately; they would form a different case from that of the same American coming to any particular country of Europe with one cargo, and fixing himself there, to receive five remaining cargoes, one in each year successively. I repeat that time is the great agent in this matter; it is to be taken in a compound ratio of the time and the occupation, with a great preponderance on the article of time. Be the occupation what it may, it cannot happen but with few exceptions that mere length of time shall not constitute a domicile."

The Harmony, Bool, 2 C. Rob.

The native character however easily reverts, and it requires fewer circumstances to constitute domicile in the case of a native subject than to impress the national character on one who is originally of another country. *La Virginie, Coigneau*, 5 C. Rob. 99.

National character by occupation may be more easily changed than that by birth, but the change must be *bonâ fide* and cannot be effected by a mere money payment. *The Ernst Merck*, 1 Spinks, 102.

A person however who on the breaking out of hostilities takes early steps to withdraw himself from the enemy's country, will be entitled to restitution of his property, although he may have been prevented from carrying out his intention by violent detention with-

in the territories of the enemy. *The Ocean, Harmsen*, 5 C. Rob. 90. "So," says Sir C. Robinson in a note to his Reports, "in *The Doornhaag* restitution was decreed to A. B., removing from Holland, of a ship and parts of a cargo allotted to him on the dissolution of the partnership for the purpose of his removal. The situation of British subjects wishing to remove from the country of the enemy in the event of a war, but prevented by the sudden interruption of hostilities from taking measures for removing sufficiently early to enable them to obtain restitution, forms not unfrequently a case of considerable hardship in the Prize Court. In such cases it would be advisable for persons so situated on their actual removal to make application to government for a special pass, rather than to hazard valuable property, to the effect of a mere previous intention to remove, dubious as that intention may frequently appear under the circumstances that prevent it from being carried into execution." 5 C. Rob. 91, n. See also *The Dree Gebroeders*, 4 C. Rob. 234; *The Juffrouw Catharina, Hansen*, 5 C. Rob. 141; *Cremidi v. Powell*, 11 Moo. P.C.C. 88.

Although in general a person acquires the national character of the country in which he is domiciled, this has been held not to be the case where a person was resident in eastern countries. "Wherever," says Sir Wm. Scott, "a mere factory is founded in the eastern parts of the world, European persons trading under the

shelter and protection of those establishments are conceived to take their national character from that association under which they live and carry on their commerce. It is a rule of the law of nations, applying peculiarly to those countries, and is different from what prevails ordinarily in Europe and the western parts of the world, in which men take their present national character from the general character of the country in which they are resident; and this distinction arises from the nature and habit of the countries. In the Western parts of the world alien merchants mix in the society of the natives; access and intermixture are permitted, and they become incorporated to almost the full extent. But in the East, from the oldest times an immiscible character has been kept up; foreigners are not admitted into the general body and mass of the society of the nation; they continue strangers and sojourners as all their fathers were—*Doris amara suam non intermiscuit undam*; not acquiring any national character under the general sovereignty of the country, and not trading under any recognized authority of their own original country, they have been held to derive their present character from that of the association or factory under whose protection they live and carry on their trade.

"With respect to establishments in Turkey, it was declared in the case of Mr. Fremeaux (1784) in the last war, that a merchant carrying on trade at Smyrna under the pro-

tection of the Dutch consul at Smyrna, was to be considered as a Dutchman, and in that case the ship and goods belonging to Mr. Fremeaux being taken after the order of reprisals against Holland, were condemned as Dutch property. The same in China, and I may say generally throughout the East, persons admitted into a factory are not known in their own peculiar national character; and being not admitted to assume the character of the country, they are considered only in the character of that association or factory." *The Indian Chief*, 3 C. Rob. 28.

These considerations however even in former times were not applicable to persons domiciled in British India; "for though," observes Sir *William Scott*, "the sovereignty of the Mogul is occasionally brought forward for purposes of policy, it hardly exists otherwise than as a phantom. It is not applied in any way for the actual regulation of our establishments. This country exercises the power of declaring war and peace, which is among the strongest marks of actual sovereignty, and if the high, or as I may almost say this empyrean sovereignty of the Mogul is sometimes brought down from the clouds, as it were, for purposes of policy, it by no means interferes with that actual authority which this country and the East India Company—a creature of this country—exercises there with full effect." *The Indian Chief*, 3 C. Rob. 22, 31.

The property of a person may

acquire a hostile character independently of his national character derived from personal residence. Thus it is clear that if a person enter into a house of trade in the enemy's country in time of war, or continue that connection during the war, he will not be able to protect himself by mere residence either in a neutral (*The Vigilantia*, *Gerritz*, 1 C. Rob. 15) or belligerent country. See *The Jonge Klassina*, *Bol*, 5 C. Rob. 297, in which case it was urged on behalf of a British subject who was carrying on a trade in Holland, "that he was settled in this country and engaged in extensive manufactures here." Sir *Wm. Scott* however held that his establishment in this country could not be permitted to affect his national character. "A man," added the learned Judge, "may have mercantile concerns in two countries, and if he acts as a merchant of both, he must be liable to be considered as a subject of both with regard to the transactions originating respectively in those countries. That he has no counting-house in the enemy's country will not be decisive. How much of the great mercantile concerns of this kingdom is carried on in coffee-houses? A very considerable portion of the great insurance business is so conducted. It is indeed a vain idea that a counting-house or fixed establishment is necessary to make a man a merchant of any place. If he is there himself and acts as a merchant of that place, it is sufficient; and the mere want of a fixed counting-house

there will make no breach in the mercantile character which may well exist without it." *The Nina*, 1 Spinks, 276.

In the case however of a person carrying on trade habitually in the country of the enemy, though not resident there, he is entitled to have time to withdraw himself from that commerce; for it would press too heavily on neutrals to say that immediately on the first breaking out of a war, their goods should become subject to confiscation. *The Vigilantia*, *Gerritz*, 1 C. Rob. 15; *The Portland Farrie*, 3 C. Rob. 41; *Haasum and Ernst*, *The Jacobus Johannes*, *Miller*, Lords, Feb. 10, 1785, cited 1 C. Rob. 14; *The Ospray*, *Paddock*, Lords, March 28, 1795, *ib.* And it would be immaterial, if a person on the breaking out of war takes immediate steps to return to his own country, that he has been prevented by the violence of the enemy from carrying his intention into effect. 5 C. Rob. 90.

There are transactions so radically and fundamentally national, as to impress the national character independent of peace or war and the local residence of the parties. Thus, the produce of a person's own plantation in the colony of the enemy, though shipped in time of peace, is liable to be considered as the property of the enemy, by reason that the proprietor has incorporated himself with the permanent interests of the nation, as a holder of the soil, and is to be taken as a part of that country in that particular transaction,

independent of his own personal residence and occupation. Per Sir *Wm. Scott*, in *The Vrouw Anna Catharina*, *Mahts*, 5 C. Rob. 167. In *The Phoenix*, *Wildeboer*, 5 C. Rob. 20, a claim was given on behalf of certain persons domiciled in a neutral country for property taken on a voyage from the colony of an enemy and described to be the produce of *their own estates*: Sir *Wm. Scott* held the property liable to condemnation. "Certainly," he observed, "nothing can be more decided and fixed as the principle of this Court, and of the Supreme Court upon very solemn arguments there, that the possession of the soil does impress upon the owner the character of the country as far as the produce of that plantation is concerned, in its transportation to any other country, whatever the local residence of the owner may be. . . . As the produce of the claimant's own plantation in the colony of the enemy, this property must fall under the general law and be pronounced subject to condemnation."

Where there is nothing particular or special in the conduct of a vessel, the national character will be determined by the residence of the owner. *The Vigilantia*, *Gerritz*, 1 C. Rob. 13.

There may however be circumstances arising from the conduct of a vessel which will lead to a contrary conclusion. Thus it is a known and well-established rule with respect to a vessel, that if she is navigating under the flag or pass of a foreign country, she is

considered as bearing the national character of that nation under whose pass she sails; she makes part of its navigation, and is in every respect liable to be considered as a vessel of that country, and if that be hostile, will be condemned. Thus in *The Vrouw Elizabeth*, Probst, 5 C. Rob. 2 (Sept. 6, 1803), a ship having been taken under a Dutch flag and pass on a voyage from Surinam to Holland, a claim was given on the part of a merchant of Bremen, stating "the ship to have been *bonâ fide* his property, though nominally transferred to a Dutch merchant, and placed under a Dutch flag and pass, for the purpose of enabling her to trade between the Dutch colonies and Holland:" Sir *William Scott*, without any hesitation, pronounced the ship to be subject to condemnation. "I hold the claim," he observed, "to be against the established rules of law, by which it has been decided, that a vessel sailing under the colours and pass of a nation is to be considered as clothed with the national character of that country. With goods it may be otherwise; but ships have a peculiar character impressed upon them by the special nature of their documents, and have always been held to the character with which they are so invested, to the exclusion of any claim of interest that persons living in neutral countries may have in them. In the war before the last, this principle was strongly recognized in the case of a ship taken on a voyage from Surinam to Amsterdam, and docu-

mented as a Dutch ship. Claims were given for specific shares on behalf of persons resident in Switzerland, and one claim was on behalf of a lady, to whom a share had devolved by inheritance, whether during hostilities or not I do not accurately remember, but if it was so she had done no act whatever with regard to that property, and it might be said to have dropped by mere accident into her lap. In that case, however, it was held that the fact of sailing under the Dutch flag and pass was decisive against the admission of any claim; and it was observed that as the vessel had been enjoying the privileges of a Dutch character, the parties could not expect to reap the advantages of such an employment, without being subject at the same time to the inconveniences attaching on it." And see *The Vrouw Anna Catherina*, Mahts, 5 C. Rob. 167; *The Goede Hoop*, 2 Acton, 32.

Although when a vessel is sailing under a neutral flag, the captors may show that all the property is not neutral, but that part belongs to the enemy, and in that case the hostile part only will be condemned; the converse of the proposition is not true, for where a vessel is sailing under a hostile flag, a neutral cannot claim any part of the property in the vessel under such flag. *The Industrie*, 1 Spinks, 54, 57; *The Primus*, ib. 48.

The rule however under particular circumstances may be departed from. Thus, when it had been stipulated by the Treaty of

Amiens that the British should have liberty to withdraw their property from the ceded and restored islands, but the governments of France and Holland afterwards refused to suffer such property to be exported from these colonies otherwise than in ships of France or Holland, and on a destination to those countries; the difficulty which arose in the removal of British property, for want of shipping, induced our own government to permit *British ships to put themselves under Dutch flags* for this particular purpose; and in such cases the particular situation of affairs arising out of this refusal to execute the Treaty, entitled such parties to a declaration of the general rule. 5 C. Rob. 7; and see *The Onderneeming*, 5 C. Rob. 7, n.

Although however a subject's or neutral's share of a ship navigating under an enemy's flag and pass will in general be confiscated, he may obtain restitution of such parts of the cargo belonging to him, if he has not assumed the character of the enemy, so as to render such parts liable to be considered as enemy's property. *The Vreede, Scholtys*, 5 C. Rob. 5, n.; *Broders Lust*, ib. 6, n.

Although the flag or pass of a nation subjects the vessel bearing it to be treated as belonging to that nation, it will not be considered to impress upon him that character conclusively; in effect, all that has been decided respecting the flag and pass is this, "that the party who takes the benefit of them is himself bound by them;

he is not at liberty, when they happen to turn to his disadvantage, to turn round and deny the character which he has worn for his own benefit, and upon the credit of his own oaths or solemn declarations; but they do not bind other parties as against him; other parties are at liberty to show that these are spurious credentials, assumed for the purpose of disguising the real character of the vessel; and it is no inconsiderable part of the ordinary occupation of the Court of Admiralty to pull off this mask, and exhibit the vessel so disguised in her true character of an enemy's vessel." *The Fortuna, Verissimo*, 1 Dods. 87; *The Success, Smith*, ib. 131.

In like manner and upon similar principles, if a vessel purchased in the enemy's country is, by constant and habitual occupation, continually employed in the trade of that country, commencing with the war, continuing during the war, and evidently on account of the war, that vessel will be deemed a ship of the country from which she is so navigating, in the same manner as if she evidently belonged to the inhabitants of it. *The Vigilantia, Gerritz*, 1 C. Rob. 13; *The Endraught, Broetjas*, ib. 20; *The Omnibus, Tennes*, 6 C. Rob. 71.

In countries where the coasting-trade is not thrown open to foreign vessels, habitual employment in such trade will stamp a neutral vessel with a hostile character (*The Welvaart, Cornelis*, 1 C. Rob. 122); one voyage however

would not have that effect. *Ib.* 124.

In time of peace a transfer of property may be made *in transitu*, to a neutral; when war intervenes, another rule is set up by the Courts of Admiralty.

In a state of war, *existing* or *imminent*, it is held that the property shall be deemed to continue as it was at the time of shipment till the actual delivery; this arises out of the state of war, which gives a belligerent a right to stop the goods of his enemy. If such a rule did not exist, all goods shipped in the enemy's country would be protected by transfers which it would be impossible to detect. It has on that principle been held as a general rule, that property cannot be converted *in transitu* by an enemy. *Vrouw Margaretha, Origeman*, 1 C. Rob. 336; see also, *The Sechs Geschwistern*, 4 C. Rob. 100; *The Jan Frederick*, 5 C. Rob. 128; *The Benedict*, Spinks, 314; *The Caroline, Kraft*, Spinks, 252; *The Neptune, Keetley*, Spinks, 281; *The Rapid, Hansen*, *ib.* 80; *The Christine, Schwartz*, *ib.* 82; *The Ernst Merck, Krüger*, *ib.* 98; *The Rapida, Bokelman*, *ib.* 172; *The Soglasie, Fischer*, *ib.* 104.

Upon the same principle, if, during or in contemplation of war, property shipped by a neutral and going to be delivered in the enemy's country, under a contract to become the property of the enemy immediately on its arrival, be taken *in transitu*, it will be considered as enemy's property, and the cap-

ture being considered as delivery, and the captors by the rights of war standing in the place of the enemy, they are entitled to a condemnation of goods passing under such a contract, as of enemy's property. *The Sally, Griffiths*, 3 C. Rob. 300, n., 302, n.; *The Anna Catherina, Wupper*, 4 C. Rob. 107; *The Danckobaar Africaan, Smit*, 1 C. Rob. 107.

And, as we have before seen, when a ship sails in a particular character she cannot change it *in transitu*. *The Negotie en Zeevaart*, cited 1 C. Rob. 110, 112; *The Herstelder, De Koe*, *ib.* 116.

Although however a ship may not have reached her original port of destination, the *transitus* will be held to have ceased when she has come into the actual possession of a neutral transferee, and if she be afterwards captured, she must be restored. See *Sorensen v. The Queen*, 11 Moo. P. C. C. 141. There a Russian vessel was sold, *bond fide* and absolutely, by an enemy to a neutral, when the war between Russia and Great Britain was imminent. The vessel was at the time of the sale in the prosecution of a voyage from Libau, an enemy's port, to Copenhagen, a neutral port, where she arrived and was taken possession of by the purchaser. It was held in the Privy Council (reversing the sentence of the Admiralty Court), that the sale, though *in transitu*, was valid, as the *transitus* had ceased when the vessel had come into the possession of the purchaser, before the seizure.

It is a moot question whether a British subject can, when war is imminent, enter legally into a contract with a subject of a state likely to become hostile for the purpose of purchasing his property in ships. Per Dr. *Lushington*, 1 Spinks, 268.

It is competent however to neutrals to purchase the property of the enemy to another country, if it be not *in transitu*, *imminente bello*, or even *flagrante bello*; and the purchase is valid, whether the subject of it be lying in a neutral port or in an enemy's port (Spinks, 16; *Batten v. The Queen*, 11 Moo. P. C. C. 271; *Sorensen v. The Queen*, ib. 119), but the transfer must be *bond fide*. *The Johanna Emilie*, 1 Spinks, 12; *The Johann Christoph*, ib. 60; *The Rapid*, ib. 80; *The Ernst, Merck*, Ib. 98.

Where a ship, asserted to have been transferred, "is continued under the former agency in the former habits of trade, all the swearing in the world will not convince the Court that it is a genuine transaction." *The Omnibus*, 6 C. Rob. 71; *The Christine*, 1 Spinks, 82; *The Soglasie*, Ib. 104.

No lien claimed by a neutral upon property captured from the enemy will be allowed to prevail in a Court of Prize. "Captors," says Sir *Wm. Scott*, "are supposed to lay their hands on the gross tangible property, on which there may be many just claims outstanding between other parties, which can have no operation as to them. If such a rule did not exist, it would be quite impossible for cap-

tors to know upon what grounds they were proceeding to make any seizure. The fairest and most credible documents, declaring the property to belong to the enemy, would only serve to mislead them, if such documents were liable to be overruled by liens which could not in any manner come to their knowledge. It would be equally impossible for the court which has to decide upon the question of property to admit such considerations. The doctrine of liens depends very much on the particular rules of jurisprudence which prevail in different countries. To decide judicially on such claims would require of the Court a perfect knowledge of the law of covenant, and the application of that law in different countries, under all the diversities in which that law exists. From necessity therefore the Court would be obliged to shut the door against such discussions, and to decide on the simple title of property, with scarcely any exceptions." *The Marianna, Posadillo*, 6 C. Rob. 25; see also, *The Josephine, Fish*, 4 C. Rob. 25; *The Tobago*, 5 ib. 218; *The Aina, Nystrom*, Spinks, 8; *The Ida, Steen*, ib. 26.

An important question arises in the case of recaptures from the enemy, whether the property in the goods recaptured had already passed to him from the original owner or not; for if the property has passed to the enemy, the captors will be absolutely entitled to it. If, on the other hand, it had not absolutely vested in him, it would, according to the *jus post-*

liminii, be restored to the original owner upon payment of salvage.

It appears from the judgment of Sir William Scott in *The Santa Cruz*, that there is no uniform law of nations upon the subject.

According to some nations the rule of pernoctation and twenty-four hours' possession prevails; that is to say, if a vessel has been captured, upon the captor retaining possession of it for twenty-four hours the property is changed and the vessel passes to him. According to some nations it is necessary to bring the captured ship *infra præsidia*, that is to say, to a place of security, whether that be to a port or a fleet belonging to the captor's nation, in order to vest the property in him. Other nations, and amongst those Great Britain, deem a regular sentence of condemnation by a competent court necessary to change the property.

Where a British ship, captured by the enemy, has been sold to a neutral after having been condemned by a competent tribunal (*The Henrick and Maria*, 4 C. Rob. 43; *The Comet*, 5 C. Rob. 285; *The Cornelia*, Edw. 244; *The Purissima Conception*, 6 C. Rob. 45), or where the sale to a neutral has taken place after an irregular condemnation, and the vessel has been afterwards legally condemned (*The Falcon*, 6 C. Rob. 194), or where peace has intervened after the transfer (*The Schoone Sophie*, 6 C. Rob. 138), the original British owner cannot, on a recapture, claim possession of the ship; and see *The Helena*, 4 C. Rob. 3.

Where, however, a British ship has been recaptured from the enemy before condemnation, she will be restored to the former owner on the terms of his paying salvage.

The Prize Acts have been drawn with the intention of expressing the sense and meaning of the law of nations which existed independently of them. See *The Ceylon*, 1 Dods. 116.

By the Prize Act, 45 Geo. III. c. 72, s. 7, it is in effect enacted that any vessel or goods therein, belonging to British subjects, and taken by the enemy as prize, which shall be retaken, shall be restored to the former owners, upon payment of a salvage of one-eighth part of the value thereof, if retaken by his Majesty's ships, and if retaken by any privateer, or other ship or vessel under his Majesty's protection, of one-sixth part of such value. And if the same shall have been retaken by the joint operation of his Majesty's ships and privateers, then the proper court shall order such salvage as shall be deemed fit and reasonable. But if the vessel so retaken shall appear to have been *set forth* by the enemy as a ship of war, then the same shall not be restored to the former owners, but shall be adjudged lawful prize for the benefit of the captors.

The Prize Act of Russia, 1854, 17 & 18 Vict. c. 18, is somewhat similar in its terms, omitting, however, all reference to privateers, who were not allowed to be employed during the Russian war.

It enacts that "any ship, vessel, goods, or merchandise, belonging to any of her Majesty's subjects captured by any of her Majesty's enemies, and afterwards recaptured from the enemy by any of her Majesty's ships or vessels of war, shall be adjudged by the decree of the Court of Admiralty to be restored to the owner or proprietor thereof upon payment for and in lieu of salvage of one-eighth part of the true value of the said ship, vessel, goods, or merchandise respectively, and such salvage of one-eighth shall be divided and distributed in such manner and proportion as is hereinbefore directed in cases of prize; provided nevertheless that if any such ship or vessel captured and recaptured as aforesaid, shall have been by her Majesty's enemies set forth or used as a ship or vessel of war, it shall not be restored to the former owner or proprietor thereof, but shall be adjudged lawful prize for the benefit of the captors:" s. 9. And ships of her Majesty's subjects recaptured before being carried into an enemy's port may be allowed to prosecute their voyage: s. 10.

As to what constitutes a *setting forth* by the enemy of a captured vessel as a ship of war, see *The Ceylon*, 1 Dods. 105; *The Georgiana*, 1 Dods. 397, 401; *L'Actif*, Edw. 185; *The Nostra Signora del Rosario*, 3 C. Rob. 10; *The Horatio*, 6 C. Rob. 320.

The point sometimes arises as to what amounts to such a capture by the enemy as would found a case of recapture. It is

by no means necessary that the possession of the enemy should be long maintained. The question will be whether it was an effectual possession, not whether it was a complete and firm possession, which for some purposes is in contemplation of law, not held to be effected till the prize is carried *infra præsidia*. The rule of *infra præsidia*, however, is certainly not to be applied to questions of this kind, as the clause of the Prize Act alludes to cases of salvage in which no such complete possession is supposed, since it speaks of vessels being recaptured and permitted to continue on their original voyage. 5 C. Rob. 320. If a vessel under convoy has been taken by the enemy, it is not necessary that she should have been out of sight in order to found a case of recapture; it will be sufficient, if there has been that complete and absolute possession which supercedes the authority of the convoying ship, and on recapture by the convoying ship, the recaptors will be entitled to salvage. See *The Wight*, 5 C. Rob. 315, 321.

Indeed, a vessel may, under the general maritime law, be considered as captured, if it were in the power, although it may never have been in the actual possession, of the enemy. See *The Edward and Mary*, 3 C. Rob. 305: there a British merchantman, which had separated from convoy during a storm, had been brought to by a French lugger, which came up and told the master to stay by her till the storm moderated, when they would send

a boat on board. The lugger continued alongside, sometimes ahead, and sometimes astern, and sometimes to windward for three or four hours. A British frigate, 'The Arethusa,' coming in sight, chased the lugger and captured her, during which time the merchantman escaped. It was held by Sir *William Scott*, that the recaptor was entitled to salvage under the general maritime law, although the vessel never came into the possession of the recaptor so as to bring the case within the terms of the Act of Parliament. "There have," said the learned judge, "been many cases of capture where no man has been put on board, as in ships driven on shore or into port. I remember particularly a famous case of a small British vessel armed with two swivels, which took a French privateer row-boat from Dunkirk that had attacked her; the British vessel having only three men on board, and no arms but swivels, was afraid to board the row-boat, which was full of men armed with muskets and cutlasses; but by the terror of her swivels she compelled their submission, and obliged them to go into the port of Ostend, then the port of an ally, she following them all the way at a proper distance. The only question will be, whether it is a case of salvage under the Act of Parliament, on the ground that the vessel never came into the actual and bodily possession of the recaptor. I rather incline to think it is not. The terms of the Act of Parliament, 'if at any time

afterwards surprised and retaken by any of his Majesty's ships of war,' etc., seem to point to a case attended with the circumstance of an actual possession taken. But if it is not a case of recapture under the Act, it is however still a case of salvage under the general maritime law, and I shall give the same reward as if it had been under the Act of Parliament." See also *The Pensamento Feliz*, Edw. 115; *The Resolution*, 6 C. Rob. 13.

But salvage will not be granted where the recaptor does not rescue property already in the power of the enemy; it will not be sufficient to found the claim that he probably prevents it from getting into the enemy's hands. Thus in *The Franklin*, 4 C. Rob. 147, salvage was refused for preventing a British ship from going into an enemy's port, when, after having met with bad weather, she had sprung a leak, and intended going into an enemy's port for the preservation of the lives of the crew. "I know of no case," said Sir *William Scott*, "in which military salvage has been given where the property rescued was not in the possession of the enemy, or so nearly as to be entirely and inevitably under his grasp. There has been no case of salvage, where the possession if not absolute was not almost indefeasible, as when the ship had struck and was so near as to be virtually in the hands and gripe of the enemy. In such cases, the same hazard is incurred by the salvor, and the same reason exists to hold out a stimulus to recaptors. But in

this case there was no enemy to encounter, the danger to the parties was contingent only, and though probable to occur, had not actually occurred. The case which has been cited in argument, does not in point of authority apply. It was the case of a Spanish ship (*Navarro*, Lords, 18th July, 1795) coming from New Orleans, ignorant of hostilities which had lately commenced, and going into the port of Bordeaux, where she would undoubtedly have been confiscated. A claim of salvage was set up on the part of a British cruiser; but the Court said, No, the danger was something distant and eventual; you had no conflict to sustain; as well might you demand salvage for giving the first information of a war. On the same principle, a British man of war, on the breaking out of hostilities, might seize a whole fleet going, ignorant of the war, into an enemy's port, and set up a claim of salvage against them."

A vessel liberated by the enemy on bail, by a deposit of money, although not altogether out of his power, will not found a case for salvage on a recapture; for although it may be said that the ship might be seized again, that is not enough, the Court will not grant salvage on prospective and ideal danger, and the re-seizure of a ship after the value has been deposited in a Court of Prize, is so unheard-of and improbable an event as not to be presumed; for from the moment the bail is accepted the ship is sacred to the government by which she has been liberated.

The Robert Hale, Edw. 265, 266, 267.

The right of recaptors to salvage is extinguished by a subsequent capture and sentence of condemnation, carried into execution, because it works a conversion of the property, and consequently a defeasance of the right of the salvors (1 Dods. 199); but where the sentence of the Prize Court is overruled by an order of release from the sovereign power of the state, the legal fiction of conversion cannot be resorted to, and the right of the recaptors to salvage will not be defeated. *The Charlotte Caroline*, 1 Dods. 192.

The seizure and condemnation, in time of peace, of a British vessel for a violation of the revenue laws of another country, will have the effect of working an entire defeasance of the British title, and upon war afterwards breaking out between the two countries, the ship will be condemned to the captor as property of the enemy, taken in the ordinary course of prize. *The Jeune Voyageur*, 5 C. Rob. 1.

If an enemy after capture should make a donation of a vessel to the original owner, the vessel would be condemned as a *droit* or perquisite of Admiralty, and the original proprietor would acquire no interest but as salvor, or from the subsequent liberality of the Crown. This is laid down in the principal case of *The Santa Cruz*, ante, p. 799.

With regard to the property of allies recaptured from the enemy, Sir *Wm. Scott* lays down the law in the principal case of *The Santa Cruz* as follows, "That the maritime

law of England, having adopted a most liberal rule of restitution on salvage with respect to the recaptured property of its own subjects, gives the benefit of that rule to its allies, till it appears that they act towards British property on a less liberal principle: in such a case it adopts their rule, and treats them according to their own measure of justice. This was recognized to be the law of England in the case of *The San Iago*, a case which was not decided on special circumstances nor on novel principles, but on principles of established use and authority in the jurisprudence of this country. In the discussion of that case, much attention was paid to an opinion found amongst the manuscript collections of a very experienced practitioner in the profession (Sir *E. Simpson*), which records the practice and the rule as it was understood to prevail in his time. 'The rule is that England restores on salvage to its allies; but if instances can be given of British property retaken by them, and condemned as prize, the Court of Admiralty will determine their cases according to their own rule.' This principle of reciprocity is by no means peculiar to cases of recapture; it is found also to operate in other cases of maritime law: at the breaking out of a war it is the constant practice of this country to condemn property seized before the war, if the enemy condemns, and to restore if the enemy restores." See *ante*, p. 791.

This rule is very well illustrated in the principal case of *The Santa*

Cruz, where it will be observed that the Portuguese ships recaptured before May, 1797, were condemned, because British ships had previous to that date on recapture been confiscated by the Portuguese; but as Portugal had by an ordinance of May, 1797, directed the ships of allies recaptured from the enemy to be restored on salvage, the Portuguese vessels recaptured after that date were upon the principle of reciprocity also restored upon salvage. See *The San Francisco*, Edw. 279, as to the treaty upon this subject between England and Spain.

Neutral property recaptured is not subject to salvage by the general rule of law on this subject, founded on a supposition that justice would have been done if the vessel had been carried into the port of the enemy; and that if any injury had been sustained by the act of capture, it would have been redressed by the tribunal of the country, to whose cognizance the case would regularly have been submitted. *The Huntress*, 6 C. Rob. 104, 108.

In such cases the recaptured neutral property is restored without salvage, upon the presumption that no peril has been incurred, but that on being carried into the courts of the original captor, they would have been restored. This is a presumption which is to be entertained in favour of every state, which has not sullied its character by a gross violation of the law of nations.

But the contrary presumption

takes place if states hold out decrees of condemnation, however unjust, and decrees on which the tribunals of the country are enjoined to act, and of which there is every reason to suppose that they will be carried into execution. The reasoning on which the general rule had been founded is then done away; the peril is obvious, and the case becomes simply that of meritorious rescue from the danger of condemnation. Of this nature was the decree of the French government, which was issued on the 21st November, 1806, according to which neutrals trading with Great Britain were liable to condemnation, and in such cases of recapture from the French property was restored only on payment of salvage. *The Sanson*, 6 C. Rob. 410, 413; see also *The War Onskan*, 2 C. Rob. 299; *The Eleonora Catherina*, 4 C. Rob. 156; *The Carlotta*, 5 C. Rob. 59; *The Acteon* Edw. 254.

Where moreover the enemy might on just and sound principles condemn neutral property, as, for instance, for breach of blockade, for being contraband of war, or on account of resistance to the right of visitation and search, it is clear that upon a recapture of such property the captors on restoring it would be entitled to salvage. Upon the same principle salvage was decreed on the recapture of neutral goods previously taken by the enemy on board a British armed ship. *The Fanny*, 1 Dods. 443; and see *The Elsebe*, 5 C. Rob. 176.

Who are authorized to make Prize.]

—Although the declaration of war places all the subjects of the belligerent powers in a state of hostility to each other, the usage of nations only legalizes such acts of hostilities as may be committed by persons duly commissioned by the sovereign authority. In maritime warfare, ships of the navy are duly authorized to make prize; moreover letters of marque may according to the usage of nations be granted to private armed vessels, usually termed privateers. The use however of privateers has been disapproved of by many nations, and in the last war between England, France, and Sardinia on the one side, and Russia on the other, no letters of marque were issued by any of the belligerents. The Queen of England, in the declaration of war, declaring "that being anxious as much as possible to lessen the evils of war, and to restrict its operations to the regularly organized forces of the country, it was not her present intention to issue letters of marque for the commissioning of privateers." Most of the neutral powers of Europe strictly prohibited their subjects from any participation in the war by accepting of letters of marque. And it appears to be contrary to the law of the United States, for any citizens or residents therein to equip privateers for the purpose of taking part in a *foreign* war. Wheaton, Intern. Law, 434, 435, n., 6th ed.

It is perfectly legal however for any of her Majesty's subjects, although they may not have a com-

mission, to seize an enemy's ship ; but it does not become the property of the captor, but of the Crown as a droit of Admiralty. There are many instances in which a capture has been made in port by non-commissioned captors, and the usual form has been for the proceedings to be conducted under the authority of the Proctor for the Admiralty, and condemnation has passed to her Majesty in her office of Admiralty. *The Johanna Emilie*, 1 Spinks, 14.

As to the Mode of determining whether a Prize be good or not.—

“By the maritime law of nations, universally and immemorially received, there is an established method of determination, whether the capture be, or be not lawful prize.

“Before the ship or goods can be disposed of by the captor, there must be a regular judicial proceeding wherein both parties may be heard, and condemnation thereupon as prize in a Court of Admiralty, judging by the law of nations and treaties.

“The proper and regular court for these condemnations is the court of that state to whom the captor belongs.

“The evidence to acquit or condemn, with or without costs or damages, must, in the first instance, come merely from the ship taken, viz. the papers on board and the examination on oath of the master and other principal officers ; for which purpose there are officers of Admiralty in all the considerable seaports of every maritime power

at war, to examine the captains and other principal officers of every ship brought in as prize, upon general and impartial interrogatories. If there do not appear from thence ground to condemn, as enemy's property or contraband, goods going to the enemy, there must be an acquittal ; unless from the aforesaid evidence the property shall appear so doubtful that it is reasonable to go into the further proof thereof.

“A claim of ships or goods must be supported by the oath of somebody, at least as to belief.

“The law of nations requires good faith ; therefore every ship must be provided with complete and genuine papers, and the master at least should be privy to the truth of the transaction.

“To enforce these rules, if there be false or colourable papers, if any papers be thrown overboard, if the master and officers examined *in præparatorio* grossly prevaricate, if proper ship's papers are not on board, or if the master and crew cannot say whether the ship or cargo be the property of a friend or enemy, the law of nations allows, according to the different degrees of misbehaviour or suspicion arising from the fault of the ship taken and other circumstances of the case, costs to be paid, or not to be received, by the claimant in case of acquittal and restitution. On the other hand, if a seizure is made without probable cause, the captor is adjudged to pay costs and damages ; for which purpose all privateers are obliged to give secu-

rity for their good behaviour; and this is referred to and expressly stipulated by many treaties.

"Though from the ship's papers, and the preparatory examinations, the property do not sufficiently appear to be neutral, the claimant is often indulged with time to send over affidavits to supply that defect; if he will not show the property by sufficient affidavits to be neutral, it is presumed to belong to the enemy. Where the property appears from evidence not on board the ship, the captor is justified in bringing her in, and excused paying costs, because he is not in fault; or, according to the circumstances of the case, may be justly entitled to receive his costs.

"If the sentence of the Court of Admiralty is thought to be erroneous, there is in every maritime country a Superior Court of Review, consisting of the most considerable persons, to which the parties who think themselves ag-

grieved may appeal; and this Superior Court judges by the same rule which governs the Court of Admiralty, viz. the law of nations and the treaties subsisting with that neutral power whose subject is a party before them.

"If no appeal is offered, it is an acknowledgment of the justice of the sentence by the parties themselves, and conclusive." Answer to the Prussian Memorial concerning Neutral Ships, Harg. Coll. Jur. 134; see also *Schacht v. Otter*, 9 Moo. P. C. C. 156, 157, 158.

The general rule is that a prize shall be brought into a port belonging to the captor's country, or to an ally, but under peculiar circumstances the Court of Admiralty will condemn a prize which has been taken into and is in a neutral port and allow it to be sold there. *The Polka*, Spinks, 57; and see *The Henrick* and *Maria*, 4 C. Rob. 43.

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Secus where accidental damage only has been made good, *ib.*

Or where the money was raised to release the master from prison for a private debt, 85, 86.

Shipowner can claim contribution as for, when part of ship or tackle has been sacrificed for the whole concern, 86.

As if sails are cut down in a tempest, 87.

Secus if the loss is accidental, *ib.*

As where damage is done by carrying unusual press of sail to escape an enemy, *ib.*

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Semble, loss occasioned by ship being run aground to escape shipwreck, gives rise to, 88, 89, 90.

Arising from extraordinary expenditure for joint benefit of ship and cargo, 90.

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Wages and provisions of crew during detention by embargo, not the subject of, 92.

The expense of hiring extra hands to pump at a leak is, *ib.*

But not the hiring of men in place of deserters, *ib.*

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Whether in repairs of the ship accidentally stranded, *ib.*

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Wearing apparel and jewels if carried on the person do not contribute, *ib.*

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As must goods carried on deck, 95.

Even though in some cases they cannot claim contribution, *ib.*

Provisions and warlike stores are exempted from, *ib.*

As to mode of adjusting, ib.

Distinction between expenditure and a sacrifice made for the benefit of all, *ib.*

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Where expenses are of an extraordinary character, *ib.*

Where goods are jettisoned, loss how to be estimated, *ib.*

Where part of the ship is sacrificed, *ib.*

Loss of freight, *ib.*

Expense of raising money abroad, *ib.*

Contributory value of ship, *ib.*

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Underwriter when bound by it, 97.

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Master has a lien on the goods for, *ib.*

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Lord *Tenterden's* recommendation of a stipulation in a Bill of Lading, *ib.*

Underwriters, how far liable to make good an average loss to the insured, *ib.*

Court of Equity has only concurrent jurisdiction in cases of contribution to general average, *ib.*

As action will lie by one shipper of goods against another, for, *ib.*

By the shipowner against the owners of cargo, *ib.*

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GENERAL BALANCE, lien of, for. *See* LIEN.

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Of commercial business an interest of outgoing partner, 313.

May be valued, *ib.*

Estate of deceased partner entitled to participate in, *ib.*

When retiring partner not allowed anything for, *ib.*

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Whether partner can bind firm by, 270.

Of one partner, action may be maintained by firm on, when, 329.

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Heir entitled to, cannot claim exoneration out of personalty in England, 237.

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Or of a Scotch movable debt, *ib.* *See* CONFLICT OF LAWS.

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Contract of, to enter into partnership, not void, 305.

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Where effect of, in a foreign country, is a mere discharge of the debtor's person, it is no defence to proceedings here, 249.

Order for discharge under Maryland Insolvent Act, no bar to suit for debt contracted here, *ib.*

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Custom of London and Exeter for innkeeper to sell guest's horse, when, *ib.*

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He does not lose it by guest going away, *ib.*

Will not have it unless goods came into his possession in his character of innkeeper as belonging to a guest, *ib.*

Cannot be claimed in respect of horses and carriage standing at livery, *ib.*

Nor reckoning for beer and ale drunk by guests, unless requirements of Stat. 11 & 12 Will. III. c. 15, have been complied with, *ib.*

Has a lien by express contract for money lent to his guest, 585.

Of common carrier is a common law lien, *ib.*

Can only detain goods for price of carriage, *ib.*

Except under contract or usage, *ib.*

Claim to retain for general balance by proving usage, *ib.*

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 - horsebreaker, *ib.*
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 - of bailee favoured at law, *ib.*
- Bailee not entitled to, when he does not confer any additional value on chattel, *ib.*
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- Or where work on chattel is contracted to be paid in a particular manner, *ib.*
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 - by contract, may be either particular or general, 593.
- Of common carrier for general balance by express contract, *ib.*
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- Goods of third parties not liable to, *ib.*
- Common carrier cannot refuse to carry goods except on terms of a lien for his general balance, *ib.*
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 - arising by implication, *ib.*
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- Whether he be home or foreign factor, *ib.*
- Claim limited to goods coming into his hands as factor, *ib.*
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Or on deposit of partner for general balance of another firm of which he is a member, *ib.*

Or on muniments left by mistake, 597.

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lost by abandonment of possession of goods, *ib.*

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Semble, immaterial that securities are already due, 600.

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Vendee takes goods subject to, 601.

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- Or receiver of partnership property, when appointed, 327.

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- Power to sell *part* of cargo for *repairs* of ship, when, 66.
- This amounts to a loan from the shipper or owner of goods, *ib.*
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- Either the price of the goods at the place of sale, 67.
 - or at the port of destination, *ib.*
 - unless the vessel failed to reach it, *ib.*
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 - reason why master can sell only *part* of cargo for repairs of ship, *ib.*
 - when the owner of the goods must contribute under the head of general average, *ib.*
- Can sell the ship when the voyage becomes hopeless, *ib.*
- As when vessel becomes a complete wreck, *ib.*
- Or repairs would exceed her value, *ib.*
- Where no communication is to be had with owners, and no money can be obtained for repairs, *ib.*
- Sale by, only permitted in cases of urgent necessity, 68.
- Sale only justifiable after all attempts to rescue ship have failed, *ib.*
- Or if capable of repair that money could not be procured, *ib.*
- Sale not justifiable from mere difficulty in procuring funds, *ib.*
- Or materials for repairs, *ib.*
- Nor though vessel be in imminent danger, *ib.*
- If master sells without a sufficient examination, *ib.*
- Or unless on the best and soundest judgment under the circumstances, *ib.*
- Burden of proof of propriety of sale, *ib.*
- Has authority to receive proceeds of sale himself, *ib.*
 - or to order payment of them to others, *ib.*
- Has authority to sell cargo for proprietors of, when, *ib.*
 - in cases of instant and unforeseen necessity, *ib.*
 - as in case of a perishable cargo driven into port, 69.
 - shipowner as well as master liable in trover for cargo erroneously sold by master, *ib.*
 - though master exercised his discretion *bonâ fide*, *ib.*
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- When he may transship cargo, 70.
- Is entitled to the whole freight contracted for, *ib.*
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- Upon whom loss falls when transshipment is effected at higher rate of freight, 72.
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- Or seize property belonging to his enemy, *ib.*
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 - Distance calculated liberally for a neutral state, *ib.*
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 - And not merely from the mainland, *ib.*
 - Extends to ports, 636.
 - harbours, *ib.*
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- Common use to different states presumed in, *ib.*
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- It must be clear, *ib.*
- Capture of vessel within neutral territory invalid, *ib.*
- Or of vessel beyond neutral territory by vessel within it, 637, 638, 639.
- Captors must not station themselves in mouths of neutral rivers, 639.
- Nor within neutral harbour, *ib.*
- But if accidentally within neutral harbour, may capture enemy beyond protection of, *ib.*
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Of abandonment in cases of total loss, when it must be given to insurers,
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Unless they hold as partners in trade, *ib.*

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PARTIES TO SUIT,

The *lex fori* regulates. *See* CONFLICT OF LAWS.

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General rule that each is agent for, and may bind the rest in partnership
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Whether they be active, *ib.*

nominal, *ib.*

or dormant, *ib.*

Although partners may agree not to do certain partnership acts, act of
one binds them to third parties, 266.

Unless the third parties have notice of the agreement, *ib.*

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purchase of goods, *ib.*

sale of partnership goods, *ib.*

or a pledge of them, *ib.*

Even in the case of a particular adventure, *ib.*

Distinction between joint-purchase or sub-purchase and partnership, *ib.*

Joint-owner can only pledge or sell his own share, *ib.*

Partner cannot, it seems, without express authority of firm, bind them
by raising money to increase capital, *ib.*

in partnership in trade can bind firm by drawing a bill of exchange
in its name, 267.

by accepting bill of exchange, *ib.*

or indorsing one, *ib.*

by giving promissory note, *ib.*

Unless title of person seeking to change them can be impeached, *ib.*

Bill drawn in name of one partner binding on all, if that be the style of
the firm, *ib.*

or if partnership is carried on in the name of one, when, *ib.*

As to onus of, showing that a single name is not used for the firm, *ib.*

without special authority, can only bind firm by the partnership
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Result of signing the true names of partners instead of fictitious name
of firm, *ib.*

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Firm may use one name for general business, and another for indorsing negotiable instruments, 268.

not liable for bills or notes accepted or given before he joined the firm, *ib.*

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or promissory note, *ib.*

As in the case of a farmer, *ib.*

an attorney, *ib.*

a partner in a farming concern, *ib.*

or in a mine, *ib.*

Power by partner to bind by bill or note, a non-mercantile firm when necessary in a particular instance, *ib.*

or when usual in similar partnerships, *ib.*

Coal mining company may be considered sometimes a trading company, 269.

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Firm may be bound by, though given out of usual course of business, if adopted by firm, *ib.*

Question of adoption left for consideration of jury, *ib.*

Case of *Brettel v. Williams* (4 Exch. 623), 270, 271.

Partner may also bind firm by an acknowledgment, 271.

admission, *ib.*

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Part payment of principal or interest by one partner or co-contractor, was formerly an answer to plea of Statute of Limitations, *ib.*

Secus since Mercantile Law Amendment Act (19 & 20 Vict. c. 97), *ib.*

Conflicting authorities as to whether sect. 14 of Act is retrospective, *ib.*

Quere whether a copartner is an agent duly authorized under the 13th section, *ib.*

Acts of surviving partners before statute did not keep debt alive against representatives of deceased partner, *ib.*

cannot bind firm by a submission to arbitration, *ib.*

by a consent to an order for a judgment, 273.

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Firm not bound by contract of a partner not in the name of the partnership, *ib.*

Though firm may have profited thereby, *ib.*

As where one partner signs in his own name a promissory note, *ib.*

or draws or accepts a bill of exchange, *ib.*

or executes a power of attorney, *ib.*

or borrows a sum of money, *ib.*

Secus if one partner purchases and applies to use of firm goods in which it usually deals, *ib.*

PARTNER—*continued.*

Liability of firm on one partner entering into contract as security for firm, 273.

cannot bind firm by contract wholly unconnected with its business, 274.

Firm not bound by securities fraudulently obtained from a partner, *ib.*

As where money is fraudulently raised by one partner on negotiable instruments, *ib.*

Even if they get into the hands of an indorsee, *ib.*

Unless he can prove that he gave a valuable consideration for them, *ib.*

They may be enforced against partnership by indorsee for value without fraud, *ib.*

Or by indorsee not knowing that they had been fraudulently obtained, 275.

Firm bound by receipt of, if it be part of the business to receive money, *ib.*

Though partner may misappropriate it, *ib.*

Firm of attorneys bound by receipt of a partner for money to be invested on a particular security, *ib.*

Secus where the money is paid for the general purpose of investing it, *ib.*

Onus probandi, when separate creditor takes partnership security, *ib.*

Liability of partnership for money advanced to individual partner on negotiable security in the name of the firm, 275.

not rebutted by mere knowledge of creditor that advance has been carried to account of partner, *ib.*

Under what circumstances firm is liable for security given for antecedent debt of partner, *ib.*

Act or admission of partner in proceedings in law or equity binding on firm, 276.

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may bind firm by agreeing to stay proceedings, *ib.*

or entering an appearance, *ib.*

may give notice in legal proceedings, *ib.*

Or of abandonment of a cargo in cases of insurance, *ib.*

One of two or more joint lessors cannot give notice to quit, *ib.*

Unless they hold lease as partners in trade, *ib.*

Firm bound by fraud if against innocent parties in matters connected with business, *ib.*

As where one partner purchases goods for his own use, *ib.*

fraudulently negotiates a partnership security, *ib.*

converts money of customers of bank to his own use, *ib.*

makes a fraudulent statement, *ib.*

or fraudulently colludes with partner of another firm, *ib.*

may render firm liable for a wrong, *ib.*

for breach of the revenue laws, *ib.*

and in some cases not only civilly but criminally, *ib.*

cannot except under express power, bind firm by deed, 277.

though the partnership agreement be under seal, *ib.*

Subsequent acknowledgment of power by other partners, *ib.*

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Distinction between deed operating as a grant and a release, 277.

Semble, partner may bind firm by deed operating as a release, *ib.*

Covenant by one partner not to sue, cannot be pleaded in bar to an action by the firm, 278.

Where partner has authority to bind firm in a transaction, it will not be invalidated by use of a deed, *ib.*

Can, with consent of firm, execute a warrant of attorney for signing judgment, *ib.* See **PARTNERSHIP**.

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Terms of, usually regulated by articles, 303.

Private unincorporated, may be entered into by parol, *ib.*

Or be inferred from acts of parties, *ib.*

Persons may engage in as ostensible partners, *ib.*

as nominal partners, *ib.*

as dormant partners, *ib.*

What constitutes, *ib.*

Definition of, *ib.*

is a voluntary contract, 304.

Distinction between partnership and community of interest independent of contract, *ib.*

As between tenants in common, 304.

joint tenants, *ib.*

persons purchasing for mere purpose of division, *ib.*

the representatives of a deceased partner and the surviving partners, *ib.*

joint contractors, *ib.*

is founded on the *delectus personarum*, *ib.*

Third person cannot be introduced into, without the consent of all the partners, *ib.*

But he may become a partner of a partner in his share, *ib.*

Surviving partner not bound to take representatives of deceased partner into, *ib.*

Except in the case of a stipulation to that effect, *ib.*

According to Roman law such stipulation was void, 305.

By English law, any person or class of persons by stipulation may be introduced into, *ib.*

But stipulation must be clear, *ib.*

Option reserved to executors of deceased partner to enter into, effect of, *ib.*

All persons, *sui juris*, are competent to enter into, *ib.*

Contract of infant to enter into voidable, not void, *ib.*

Infant hable as partner, if he expressly intimates his desire to remain one, after his majority, *ib.*

Or does not repudiate contract within a reasonable time, *ib.*

An alien friend may enter into, *ib.*

But not an alien enemy, *ib.*

Or a person domiciled in an alien enemy's country, *ib.*

Married woman by common law cannot enter into, *ib.*

but she may by custom of London, 306.

upon civil death of her husband, *ib.*

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- or his transportation for a term of years, 306.
- or if being a foreigner he do not come within the realm, *ib.*
- in equity she can bind her separate property by, *ib.*
- and she may trade in during separation, under Divorce and Matrimonial Causes Act, *ib.*
- Essential to contract of, that something should be put into, *ib.*
 - either money, effects, labour, or skill, *ib.*
- Not necessary that each partner should contribute the same thing to, *ib.*
- One may contribute labour and industry, *ib.*
- Roman law the same, *ib.*
- Stipulation with regard to property in capital binding, *ib.*
 - whether it be express, *ib.*
 - or implied, *ib.*
- Presumption, in the absence of stipulation, of community of interest in property as well as in profit and loss, *ib.*
 - may exist in capital stock, although price in first instance is advanced by one party, *ib.*
- Agreement on purchase of goods by one party for a division of profits of sale, will not give another property in goods, 307.
- Partner can pledge whole stock, partowner merely his own share, *ib.*
 - must be constituted for a lawful purpose, *ib.*
- Void if for an immoral purpose, *ib.*
 - as for keeping house of ill fame, *ib.*
 - a gambling-house, *ib.*
 - or if it be in contravention of Act of Parliament, *ib.*
- Communion of profits essential to creation of, 308.
- But partner may stipulate with co-partner to be free from loss, *ib.*
- But he will still be liable to third parties, *ib.*
- Exists between parties when there is a community of interest in the stock and profits, *ib.*
- But is not essential that there should be a communion of interest in the capital stock, *ib.*
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